

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANTS AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals

For the

District of Columbia Circuit

FILED SEP 20 1957

No. 14,065

837 *Joseph W. Stewart*
CLERK

HOWARD W. THRASHER
and
DORIS MAY THRASHER,

Appellants,

v.

GIANT FOOD SHOPPING CENTER, INC.
and
JOHN E. CUNNINGHAM,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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(i)

STATEMENT OF QUESTIONS PRESENTED

I

Failure to call as a witness one of ten attending physicians who treated injured plaintiff does not raise the presumption or inference that the testimony of the absent witness would be unfavorable to plaintiff where defense counsel, prior to trial, was notified that the witness in question and two other attending physicians would not be called by plaintiff and defendant thereafter subpoenaed two of the physicians and obtained their testimony at the trial.

II

Testimony of an attending physician and argument of counsel before jury that injured plaintiff was "probably trying to set up an insurance case to collect insurance" was clearly irrelevant and should have been stricken by trial judge when objected to by counsel.

III

Jury verdict should be set aside where it clearly appears from uncontradicted evidence that the amount of the verdict bears no reasonable relation to the loss suffered by the plaintiffs and where there is a clear showing that the verdict was influenced by errors of law committed during the trial of the case.

(ii)

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UNITED STATES COURT OF APPEALS
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and
DORIS MAY THRASHER,

Appellants,

v.

GIANT FOOD SHOPPING CENTER, INC.
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JOHN E. CUNNINGHAM,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT'S

JURISDICTIONAL STATEMENT

This is an appeal by Howard W. Thrasher and Doris May Thrasher plaintiffs below from a judgment in their favor against appellees, Giant Food Shopping Center, Inc. and John E. Cunningham, defendants below. The parties will be hereafter referred to as they appear in the trial Court.

This action was commenced by complaint filed by Howard W. Thrasher and Doris May Thrasher against Giant Food Shopping Center, Inc. and John E. Cunningham, claiming damages for personal injury and property damage resulting from an automobile accident on April 14, 1952, in the District of Columbia. Damages claimed by each plaintiff were in excess of \$3,000.00.

Jurisdiction was conferred on the United States District Court for the District of Columbia by Title 11, Section 306, D. C. Code 1951 Edition and on this Court by Title 28, Section 1291 U.S. Code.

STATEMENT OF THE CASE

Plaintiffs, Howard W. and Doris May Thrasher, husband and wife, sustained whip-lash type injuries in an automobile collision when the vehicle in which they were riding was struck from the rear by a tractor-trailer truck owned by defendant, Giant Food Shopping Center, Inc., and driven by their employee, John E. Cunningham. The jury found both defendants liable and awarded each plaintiff \$250.00 as damages. Plaintiffs motion to set aside verdict and for new trial was denied without hearing.

Prior to the trial, plaintiffs, at defendants request, furnished a list of witnesses to be called on behalf of plaintiffs. This list omitted the name of three physicians known to defendants to have attended the plaintiff husband after the accident. Defendants subpoenaed two of these physicians and adduced their testimony at the trial. The third physician witness was not called by either plaintiffs or defendants and over objection of plaintiffs' counsel the Court granted an instruction and permitted defense counsel to argue before the jury that plaintiffs failure to call this one physician as a witness carried the presumption and inference that if called, said witness would have testified adversely to the plaintiff husband.

Also during the trial the Court permitted testimony from one of the attending physicians which was called by plaintiffs that he had made a notation in his office records that the plaintiffs were attempting to "set up" an insurance claim. This testimony was objected to by plaintiffs' counsel but overruled by the Court. Defense counsels' comment on this testimony in his closing argument was highly prejudicial to plaintiffs.

Special damages of plaintiff husband amounted to \$523.03 and for the plaintiff wife \$107.04. In addition thereto the evidence conclusively established that plaintiffs sustained bodily injury at the time of the rear-end collision.

STATEMENT OF POINTS

(1) In holding that a physician, who has the consent of his patient (plaintiff) to testify to confidential communications, is "peculiarly available" to plaintiff.

(2) In holding that an incompetent witness is "peculiarly available" to the plaintiff.

(3) In instructing the jury that failure to produce an incompetent witness at the trial raises the presumption or inference that the testimony of said witness would be adverse to plaintiff.

(4) In failing to exclude testimony of physician-witness that injured plaintiffs were trying to "set up" an insurance claim.

(5) In failing to set aside verdict and grant plaintiffs a new trial.

(6) And for other errors which may be apparent from the record or come to the attention of the Appellate Court.

STATUTES INVOLVED**Title 14 Section 308 D.C. Code 1951 Edition**

"In the courts of the District of Columbia no physician or surgeon shall be permitted, without the consent of the person afflicted, or of his legal representative, to disclose any information, confidential in its nature, which he shall have acquired in attending a patient in a professional capacity and which was necessary to enable him to act in that capacity, whether such information shall have been obtained from the patient or from his family or from the person or persons in charge of him: Provided, That this section shall not apply to evidence in criminal cases where the accused is charged with causing the death of, or inflicting injuries upon a human being, and the disclosure shall be required in the interests of public justice; Provided further, That this section shall not apply to evidence relating to the mental competency or sanity of an accused in criminal trials where the accused raises the defense of insanity, or in the pretrial or posttrial proceedings involving any criminal case where a question arises concerning the mental condition of an accused or convicted person. (As amended, Aug. 9, 1955, 69 Stat. 612, ch. 673)

SUMMARY OF ARGUMENT

Where substantial errors of the law are committed during the trial of a case and these errors have a direct influence upon the amount of damages awarded by the jury, then the Appellate Court must remand the case for a new trial on the issue of damages.

ARGUMENT

There are before this Court three major questions of law, the first being whether an unfavorable presumption arises from a party's failure to produce an attending physician at trial. The second question is whether a highly prejudicial and irrelevant conclusion of a witness should have been excluded by the trial judge when objected to by counsel. The third question is whether an award of damages by a jury must bear some reasonable relation to the loss suffered by the plaintiffs.

I

Failure to call as a witness one of ten attending physicians who treated injured plaintiff does not raise the presumption or inference that the testimony of the absent witness would be unfavorable to plaintiff where defense counsel, prior to trial, was notified that the witness in question and two other attending physicians would not be called by plaintiff and defendant thereafter subpoenaed two of the physicians and obtained their testimony at the trial.

Prior to trial defense counsel demanded and received a list of witnesses which plaintiff intended to call upon for testimony (J.A. 69, 70). Omitted from the list were the names of three physicians who had treated the plaintiff husband. These were, Dr. Francis Forster, Dr. Desmond O'Doherty and Dr. Morris Gotlieb. Defense counsel knew from pretrial discovery that these physicians had treated the plaintiff husband and accordingly they subpoenaed Drs. Forster and O'Doherty (J.A. 71, 72, 73) and had them testify (J.A. 62, 64). The third was not called by either party.

At the trial defense counsel requested and the Court granted, over objection of plaintiffs counsel (J.A. 79, 82, 83), an instruction that the jury could infer that the testimony of any witness, peculiarly available to plaintiff, who was not called, would have been "unfavorable to the claim of the party who failed to produce him" (J.A. 81). Defense counsel was permitted to vigorously argue the failure of plaintiff to produce Dr. Gottlieb (J.A. 90, 91).

There is serious doubt as to whether the trial court should have even considered the question of whether Dr. Gottlieb was a witness "peculiarly available" to the plaintiff. The facts of the case establish otherwise. The defense knew that plaintiff did not intend to call three of his attending physicians, including Dr. Gottlieb, knowing this, they subpoenaed two of the doctors but not Dr. Gottlieb. Dr. Gottlieb - the alleged missing witness whose absence was so well argued to the prejudice of plaintiff (J. A. 90, 91) - was also available. Why wasn't a subpoena issued for him? There is no showing that he was not available nor is there any showing that the privilege was or would be claimed. Actually, the contrary is shown, for plaintiffs' counsel advised the Court and the defense attorney that no privilege would be claimed (J. A. 72, 73) the same as when plaintiffs' other two physicians were called by the defense.

A second reason as to the Court's error in granting this instruction is that no unfavorable inference can be drawn from failure of a party to produce an incompetent witness.

Title 14, Section 308 of the District of Columbia Code, 1951 Ed. renders a physician an incompetent witness to testify concerning confidential information acquired while attending a patient in his professional capacity. Hutchins v. Hutchins, (1919) 48 App. D. C. 495; Stafford v. American Security & Trust Co., (1931) 60 App. D. C. 380, 55 F (2d) 542. When a party fails to produce an incompetent witness or a witness equally available to both parties, no adverse presumption or inference can be drawn from such failure to produce the witness. Graves v. United States, (1893) 150 U.S. 118, 14 S. Ct. 40, 37 L. Ed. 1021; Billeci v. United States, 87 App. D. C. 274, 184 F. (2d) 394.

In the Graves case it was held that the failure of one party to produce an incompetent witness was not an appropriate subject for unfavorable inference and it was reversible error for the Court to permit counsel to comment before the jury upon the absence of such a witness.

In Kiehlhoefer v. Washington Power Company, (1908) 49 Wash. 646,96 P 220, the court sustained a new trial to one recovering nominal damages for personal injuries because of prejudicial comment of defendant's counsel about the failure to produce an attending physician. The court stated:

"The statute which forbids a physician to testify without the consent of his patient concerning facts which he acquires while attending the patient in a professional capacity is founded upon principals of sound public policy, and a like policy requires that the enforcement of the rule on the part of the patient be not taken as a circumstance adverse to the patient. There are cases which maintain a contrary doctrine, but we think they are not in accord with the reason of the statute, nor with the spirit of our own decisions."

From a purely practical standpoint no one knows the actual status of an attending physician until he takes the witness stand, at which time the patient must decide whether to waive or claim the privilege. Up to this point a physician is equally available to both parties. Whether he is permitted to testify is a matter of trial tactics and the problem was recognized and fully explored by counsel and court at time of trial (J. A. 72, 73).

In the case at bar, the testimony of Dr. Gottlieb was equally available to both parties and the Court erred in granting the disputed instruction and permitting defense counsel to argue that Dr. Gottlieb's testimony would be presumed to be adverse to plaintiff. While the verdict was for the plaintiffs the amount of the verdict must have been directly influenced by this instruction and argument.

II

Testimony of an attending physician and argument of counsel before jury that injured plaintiff was "probably trying to set up an insurance case to collect insurance" was clearly irrelevant and should have been stricken by trial judge when objected to by counsel.

Dr. Robert Ray Hottel, a physician in general practice (J. A. 28), attended Mrs. Thrasher immediately after the accident (J. A. 28, 29) and began treating Mr. Thrasher on April 15, 1952, the day after the accident (J. A. 30). Both had received whiplash type injuries when the car in which they were riding, while stopped, was struck in the rear by a tractor-trailer truck (J. A. 9, 10).

On April 25, 1952, eleven days after the accident and while still treating both Mr. and Mrs. Thrasher, this general practitioner of medicine entered on his records a notation "trying to set up" (J. A. 34). Over objection of counsel he was permitted to testify that this notation meant that the plaintiff husband was "probably trying to set up an insurance case to collect insurance" (J. A. 35). There is no question of the highly prejudicial effect which this irrelevant conclusion had upon the jury after defense counsel's vigorous argument on the point (J. A. 90, 92).

Appellants admit that this doctor, as a physician, could have testified that in his opinion Mr. Thrasher was not hurt or that he was malingering. But he did not testify to this - in fact he testified just the opposite - that he was hurt (J. A. 37, 38) and was treated for "sprain in the neck muscle" (J. A. 30). But to permit this doctor to speculate and testify to an irrelevant conclusion, objected to by counsel (J. A. 34, 35); was highly prejudicial and its effect upon the jury is evidenced in its verdict.

Likewise, it is interesting to note that Dr. Hottel, even after making this notation on his record, continued to treat the plaintiff-husband until July 28, 1952 (J. A. 90). Specialist later determined

that the plaintiff-husband had sustained severe injury to his cervical and lumbar spine in the collision and this makes the testimony of this medical witness even more objectionable and prejudicial.

III

Jury verdict should be set aside where it clearly appears from uncontradicted evidence that the amount of the verdict bears no reasonable relation to the loss suffered by the plaintiffs and where there is a clear showing that verdict was influenced by errors of law committed during the trial of the case.

The jury award of \$250.00 to each plaintiff bears no reasonable relation to the injury sustained by the plaintiffs.

The automobile in which plaintiffs were riding was at a standstill when, without warning, the vehicle was struck from the rear by a tractor-trailer truck owned and operated by the defendants. (J.A. 9, 10). The plaintiff husband was thrown into the steering wheel and his head snapped from the impact (J.A. 10). The plaintiff wife was thrown forward and backward with a "terrible jerk" (J.A. 25, 26).

Paragraph 5, Count 1 of the Complaint alleges that: ". . . the plaintiff, Howard W. Thrasher, was thrown forward violently in a snapping manner against the steering wheel of his automobile and then thrown backwards violently when the automobile of the plaintiff was thus forced to ram the automobile standing ahead of it, resulting in severe and permanent injuries to the plaintiff as follows: A snapping permanent injury to the cervical spine; marked narrowing of the vertebrae of the back; multiple disc injury to the back; injury to the rear of the head on both sides; nerve root compression of the back with radiation nerve pains extending throughout the trunk; both arms and both legs and the head; general injuries to the spinal column extending the length of the spine and connecting structures; a hernia and aggravation of another old hernia; a neck injury; general impairment of the nervous system; . . .".

Paragraph 5, Count 2 of the Complaint alleges that: ". . . plaintiff Doris May Thrasher, sustained severe and permanent injuries to her neck and spine, suffered from great shock, and otherwise was rendered sick, sore, lame, wounded and disordered, suffered and in the future will continue to suffer great pain and mental anguish . . .".

Uncontradicted testimony established that Mrs. Thrasher sustained a muscle strain in the neck and shoulder (J.A. 29) which required an attending physician on at least twenty different occasions (J.A. 26) and from which she continues to suffer dizziness and periodic pain in her head, neck and shoulder (J.A. 26, 27). The testimony further established that eleven days prior to the accident she had received a complete physical examination at which time she was found to be in good health (J.A. 28, 29).

Competent medical testimony pertaining to the condition of Mr. Thrasher is as follows:

1. Dr. Robert Ray Hottel a physician in general practice diagnosed and treated the plaintiff husband from April 15 to July 28, 1952, for "sprain in the neck muscle" (J.A. 30).

2. Dr. Raymond John Terrafranca a specialist in radiology (J.A. 39) testified that x-rays revealed a narrowing of the fifth regional interspace (J.A. 39); minor arthritic changes (J.A. 39, 40); a narrowed lumbo-sacroiliac interspace with forward slipping of the fourth lumbar vertebra (J.A. 40) and evidence of a herniated disc in two places (J.A. 40, 41, 42).

3. Dr. John P. Gallagher a neurological specialist testified that he examined the plaintiff husband; that the patient apparently sustained a snapping injury to the spine in his neck (J.A. 77, 80); that an examination of x-rays revealed a narrowing of the bones, specifically the fifth and sixth vertebrae (J.A. 77, 78); that in his opinion there was nerve root compression at the lesion of C-5 and C-6 level (J.A. 78); that this resulted from the accident on April 14, 1952 (J.A. 78); that

the symptoms of which the plaintiff husband was complaining were determined not to be caused by old age (J.A. 79).

4. Dr. Leland E. Stevenson testified that on examination there was found a large ventral hernia; hypoesthesia in the left face and left leg below the knee; tenderness and spasm of the neck muscles and in the low back; narrowing between the fifth and sixth lumbar vertebrae in the cervical region (J.A. 43); narrowing between the fifth lumbar vertebra and the first sacral vertebra and some forward slipping of the last lumbar vertebra (J.A. 43, 44); that the accident of April 14, 1952 could cause and probably did cause the injuries to the cervical and lumbar spine (J.A. 44); that the accident of April 14, 1952 caused the hernia to enlarge (J.A. 45).

5. Dr. Hugh Victor Rizzoli a neurological surgeon (J.A. 50) examined the plaintiff husband at which time he found tenderness over the muscles adjacent to the cervical spine on both sides; considerable limitation of motion on turning the head and neck in either direction (J.A. 51, 52); slight spasm of the muscles on both sides of the lower lumbar spine; moderate limitation of motion on bending forward and backward; diminution of sensation to pin pricks over the left side of the face, loss of sensation to pin pricks on the lower left side in the lower extremities (J.A. 52); that there was a large ventral hernia 6 to 8 inches in diameter of the abdomen (J.A. 52); that the patient has sustained a strain of the cerebral and lumbar spine and in addition had a ventral hernia which, according to his history, was a result of the accident (J.A. 52, 53).

6. Dr. Frank Curtis Hudgins, an osteopathic physician has been treating the plaintiff husband since February 10, 1956. Upon examination he found a condition in his neck similar to a whiplash neck, upon touch it (the neck) was hard and very stiff and to move it was painful (J.A. 58). X-rays of the lower back showed slipping of the last vertebra forward (J.A. 59). The sciatica will probably increase as time goes on without cure (J.A. 59). Between the 5th and 6th cervical

vertebrae, there was narrowing of the disc (J.A. 58, 59). Treatment is still continuing (J.A. 59, 60). There is atrophy of the left leg which is permanent (J.A. 60). The pains in the upper arm are from the injury to the brachial plexus (J.A. 60). This doctor does not believe the plaintiff will ever be cured (J.A. 59).

From the foregoing there is no question but that the plaintiff husband sustained a whiplash type of injury to the neck and injuries to his lumbar spine and abdomen which caused or aggravated a hernia. None of the conditions enumerated existed prior to the accident, except for a small hernia, and competent testimony has established the true condition.

Testimony of Dr. Hottel was to the effect that x-rays taken shortly after the accident revealed no evidence of fracture or dislocation of any of the bones of the neck or shoulder (J.A. 30, 31); however, the weight of competent medical testimony by specialists in the field of radiology and neurology establish beyond a doubt that subsequent to the accident serious injury was demonstrated. If the x-rays taken immediately after the accident were negative, as stated, and x-rays taken a period of time later can demonstrate this injury then, without an intervening injury, the condition must be attributable to the accident as testified to by competent medical authority.

In addition to the foregoing the plaintiffs incurred the following out of pocket expenses:

Item	Reference	Amt.	Plaintiff Husband	Plaintiff Wife
Car repair	J. A. 14	\$ 58.07*	\$ 29.03	\$ 29.04
Dr. Hottel	J. A. 30	156.00*	78.00	78.00
Dr. Stevenson	J. A. 46	125.00	125.00	
Dr. Rizzoli	J. A. 57	25.00	25.00	
Dr. Hudgins	J. A. 62	206.00	206.00	
Dr. Wein	J. A. 13	45.00	45.00	
Dr. O'Doherty	J. A. 13	15.00	15.00	
			<u>\$523.03</u>	<u>\$107.04</u>

*These items are divided equally due to joint ownership of the car and the fact that Dr. Hottel's statement was for services rendered to both husband and wife.

Can it be said from all of the foregoing that the verdict of the jury bears any reasonable relation to the injuries sustained and to the out of pocket expenses? It is clear that errors of law committed during the trial influenced and prejudiced the jury in reaching its verdict and it is respectfully submitted that the errors enumerated under Section I and II of this argument are directly responsible for the action of the jury.

Even the Court was amazed at the verdict rendered by the jury, for when the foreman announced the verdict of \$250.00 the judge expressed his astonishment by saying, "How much?" (J.A. 83, 84). It takes no imagination to look back and visualize the shock and surprise with which this verdict must have been received by the Court.

CONCLUSION

In view of the errors of law committed during the trial which resulted in a verdict having no reasonable relation to the damages suffered by the plaintiffs, this cause should be remanded to the lower court for a new trial as to damages only. It is well settled that this Court may divide the issues and limit the scope of a new trial. Washington Gas Light Company v. Connally (1954) 94 U.S. App. D.C. 156, 214 F 2d 254.

Respectfully submitted,

DANIEL L. O'CONNOR

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Attorney for Appellants

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JOINT APPENDIX

438 [Filed April 5, 1955]

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

HOWARD W. THRASHER :
 49 Girard Street, N. E. :
 Washington, D. C. :

and

DORIS MAY THRASHER :
 49 Girard Street, N. E. :
 Washington, D. C. :

Plaintiffs : Civil Action No. 1541-55

GIANT FOOD SHOPPING CENTER:
 Inc., a body corporate :
 845 Bladensburg Road, N. E. :
 Washington, D. C. :

and

JOHN E. CUNNINGHAM :
 3400 Sherman Avenue, N. W. :
 Washington, D. C. :

Defendants :

C O M P L A I N T

(Husband sues both defendants for negligence resulting in personal injuries and property damages; wife sues both defendants for negligence resulting in personal injuries and loss of consortium. Truck of corporate defendant rammed back of automobile at standstill)

COUNT ONE

1. Plaintiff, Howard W. Thrasher, is a citizen of the United States, a resident of the District of Columbia at all times mentioned, and he brings this action in his own right against the defendants, Giant Food Shopping Center, Inc., a body corporate, engaged at all times mentioned in the hauling, sale and distribution of food and food products

in the District of Columbia, and John E. Cunningham, who is a citizen of the United States, a resident of the District of Columbia and sui juris.

2. The amount in controversy exceeds the sum of Three Thousand Dollars (\$3,000.00) exclusive of interest and costs.

3. About 4:30 P.M. on April 14, 1952, plaintiff, Howard W. Thrasher, was operating a Jeep automobile west on Mt. Olivet Road, Northeast, near the intersection of said road with Brentwood Road,

439 Northeast, in the District of Columbia and had stopped back of another automobile which had stopped to let traffic pass; and at said time and place the defendant, Giant Food Shopping Center, Inc., a body corporate, owned and operated through its agent and employee, the defendant, John E. Cunningham, acting within the scope of his employment by said corporate defendant, a large trailer truck which was being driven west on said Mt. Olivet Road, Northeast, which said truck collided with and rammed the back of the automobile operated by the plaintiff with great force and violence, causing the automobile of the plaintiff to ram the automobile standing in front of it.

4. At the time and place above stated the defendants, and each of them operated said trailer truck in a negligent and careless manner in that said truck was operated without keeping a proper lookout, at an excessive rate of speed, without having said truck under proper control, and without observing the doctrine of last clear chance.

5. In consequence of the negligence and carelessness aforesaid, the plaintiff, Howard W. Thrasher, was thrown forward violently in a snapping manner against the steering wheel of his automobile and then thrown backwards violently when the automobile of the plaintiff was thus forced to ram the automobile standing ahead of it, resulting in severe and permanent injuries to the plaintiff as follows: a snapping permanent injury to the cervical spine; marked narrowing of the vertebrae of the back; multiple disc injury to the back; injury to the rear of the head on both sides; nerve root compression of the back with radiation nerve pains extending throughout the trunk; both arms and both legs and the head; general injuries to the spinal column extending the length of

the spine and connecting structures; a hernia and aggravation of another old hernia; a neck injury; general impairment of the nervous system; and impaired sexual capacity. In consequence of which plaintiff was rendered for a long period of time and still continues to be sick, sore,
440 lame, wounded and disordered, unable to perform his usual occupation and services; and the plaintiff has suffered and will in the future continue to undergo great pain and suffering and mental anguish, will be obliged to undergo delicate surgical operations in endeavoring to cure said injuries; and plaintiff has expended large sums of money for medical attention and in the future will be compelled to expend further large sums endeavoring to cure said injuries.

6. In consequence of said negligence and carelessness the automobile of the plaintiff, being the property of the plaintiff, was damaged in the sum of Three Hundred and Eighty-nine Dollars and Forty Cents (\$389.40).

WHEREFORE, plaintiff, Howard W. Thrasher, brings this action against the defendants, Giant Food Shopping Center, Inc., a body corporate, and John E. Cunningham, and claims from the defendants and each of them the sum of One Hundred Thousand, Three Hundred Eighty-nine Dollars and Forty Cents (\$100,389.40), as damages, besides the costs of this action.

COUNT TWO

1. Plaintiff, Doris May Thrasher, is a citizen of the United States, a resident of the District of Columbia, and she brings this action in her own right against the defendants, Giant Food Shopping Center, Inc., a body corporate, and John E. Cunningham, who is a citizen of the United States, a resident of the District of Columbia and sui juris.

2. At all times mentioned in this action, plaintiff has been the lawful wife of the co-plaintiff, Howard W. Thrasher.

3. The amount in controversy exceeds the sum of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs.

4. About 4:30 P. M. on April 14, 1952, plaintiff was riding in a Jeep automobile driven by her said husband which had come to a standstill on Mt. Olivet Road, Northeast, near the intersection with Brentwood Road, Northeast, in the District of Columbia, at which time
441 the said automobile in which plaintiff was seated was struck from the back with great force and violence by a large trailer-truck owned and operated by the defendant Giant Food Shopping Center, Inc., a body corporate, which was then being driven by the defendant, John E. Cunningham, acting within the scope of his employment. The said truck collided with the automobile in which plaintiff was riding as aforesaid as the result of the negligence and carelessness set forth in the fourth paragraph of count one of this complaint, which is made a part hereof by reference.

5. In consequence of the negligence and carelessness aforesaid, plaintiff Doris May Thrasher, sustained severe and permanent injuries to her neck and spine, suffered from great shock, and otherwise was rendered sick, sore, lame, wounded and disordered, suffered and in the future will continue to suffer great pain and mental anguish, and has been obliged to lay out large sums for medical treatment in and about endeavoring to cure said injuries.

6. By reason of the carelessness and negligence set forth in the first count of this complaint and the severe and permanent injuries sustained by Howard W. Thrasher, husband of plaintiff, the plaintiff has lost and will in the future continue to lose the society, services, companionship, support and consortium of her said husband.

WHEREFORE, plaintiff, Doris May Thrasher, brings this action against the defendants, Giant Food Shopping Center, Inc., a body corporate, and John E. Cunningham, and claims from the defendants, and each of them, the sum of Twenty Five Thousand Dollars (\$25,000.00), as damages for her personal injuries and loss of consortium, besides the costs of this action.

/s/ David F. Smith
Attorney for Plaintiffs
927 15th Street, N. W.
Washington, D. C.

DEMAND FOR A JURY TRIAL

Plaintiffs each demand a trial by jury of all the issues in the above entitled cause.

/s/ David F. Smith
Attorney for Plaintiffs.

442 [Filed April 18, 1955]

ANSWER TO COMPLAINTFirst Defense

Defendants, Giant Food Shopping Center, Inc., a corporation, and John E. Cunningham, admit that on April 14, 1952, near the intersection of Mt. Olivet Road with Brentwood Road, N.E., Washington, D.C., a collision occurred between a truck owned by the corporate defendant and operated by its agent, the individual defendant, and an automobile owned by the plaintiffs and operated by the male plaintiff. They are without knowledge or information sufficient to form a belief respecting the truth of the allegations of injuries and damages sustained by both plaintiffs as set forth in both counts of the complaint. They deny the remaining allegations in both counts of the complaint not herein specifically answered.

Second Defense

The injuries and damages allegedly sustained by both plaintiffs resulted from negligence and carelessness and/or contributory negligence and carelessness on the part of the plaintiffs at the time and place mentioned in the complaint.

HOGAN & HARTSON

[Certificate of Service]

By Geo. H. Horning, Jr.
Attorneys for Defendants,
810 Colorado Building
Washington 5, D. C.

443 [Filed April 11, 1957]

VERDICT AND JUDGMENT

This cause having come on for hearing on the 8th day of April, 1957, before the Court and a jury of good and lawful persons of this district, to wit:

Harry E. Tomlin

Miss Marjorie D. Spears

Mrs. Pauline M. Clark

Mrs. Belle D. Smith

Jacob P. Knofer

Mrs. Florence L. Redmond

Mrs. Elizabeth C. Ryder

Miss Velva E. Rudd

Mrs. Lydia J. Norris

William J. Rice

Mrs. Grace H. Jones

Mrs. Aleita A. Hogenson

who, after having been duly sworn to well and truly try the issues between Howard W. Thrasher and Doris May Thrasher, plaintiffs and Giant Food Shopping Center, Inc. a body corporate and John E. Cunningham, defendants, and after this cause is heard and given to the jury in charge, they upon their oath say this 11th day of April, 1957, that they find the issues aforesaid in favor of the plaintiffs and that the money payable to them by the defendants by reason of the premises is the sum of two hundred and fifty dollars (\$250.00) to Howard W. Thrasher and the sum of two hundred and fifty dollars (\$250.00) to Doris May Thrasher.

WHEREFORE, it is adjudged that said plaintiffs recover of the said defendants the sum of two hundred and fifty dollars (\$250.00) to Howard W. Thrasher and the sum of two hundred and fifty dollars (\$250.00) to Doris May Thrasher, together with costs.

Harry M. Hull, Clerk,

(n)

By /s/ Anne W. Lyddane
Deputy Clerk

By direction of

Judge David A. Pine

444 [Filed April 22, 1957]

**MOTION TO SET ASIDE VERDICT AND GRANT
A NEW TRIAL**

Come now the plaintiffs and move this Court to set aside the verdict and grant a new trial in the above-entitled cause, and for reasons thereof state:

1. The verdict of the jury was totally inadequate such as to shock the conscious of the Court;
2. It is obvious from the size of the verdict that the jury did not consider the expenses incurred by the plaintiffs and did not compensate for actual money lost;
3. It is obvious that the jury totally disregarded the uncontradicted evidence relative to plaintiffs' injuries;
4. The question as to liability is so clear that a new trial should be ordered and confined only to the element of damages; and
5. For such other and further reasons as may be advised at the hearing hereof.

/s/ Douglas A. Clark

Attorney for Plaintiffs
650 Warner Building
Washington, D. C.

[Certificate of Service]

445 [Filed April 24, 1957]

OPPOSITION TO MOTION FOR NEW TRIAL

The plaintiffs' motion for a new trial is without substance. As the Court instructed the jury, there was a sharp conflict in the medical testimony as to whether the claimed injuries were serious or were in reality nonexistent or superficial. The jury had a right under the evidence to reject the plaintiffs' contentions as to what damage resulted from the accident.

Plaintiffs' cannot properly characterize their evidence on injuries as "uncontradicted". Doctors Forster, O'Dougherty, Hottel and Wein gave testimony unfavorable to plaintiffs which the jury were entirely justified in accepting. Therefore, the motion should be denied.

Respectfully submitted,

HOGAN & HARTSON

By /s/ Frank F. Roberson
Attorneys for Defendants

[Certificate of Service]

446 [Filed April 29, 1957]

**ORDER OVERRULING MOTION TO SET ASIDE
VERDICT AND FOR NEW TRIAL**

Upon the coming on for hearing of the motion filed herein by Howard W. Thrasher and Doris May Thrasher, pltfs., for a new trial, it is this 29th day of April, 1957, ordered that said motion be, and the same is hereby overruled.

HARRY M. HULL, Clerk

By /s/ Harry R. Martin
Deputy Clerk

By direction of

David A. Pine
Judge

447 [Filed May 28, 1957]

NOTICE OF APPEAL

Notice is hereby given this 28th day of May, 1957, that Howard W. Thrasher and Doris May Thrasher, Plaintiffs hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 11th day of April, 1957, in favor of Howard W. Thrasher and Doris May Thrasher, Plaintiffs against

said defendants, Giant Food Shopping Center, Inc. and John E. Cunningham.

/s/ Doris M. Thrasher and

/s/ Howard W. Thrasher
Plaintiffs Pro Se.

Hogan & Hartson
810 Colorado Building
Washington 5, D. C.

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

1 Washington, D. C.,
April 8, 1957.

19 HOWARD WILLARD THRASHER

was called as a witness in his own behalf and, being first duly sworn,
was examined and testified as follows:

24 Q. You stopped behind this car. Tell us what happened. A. I
stopped behind this car, naturally. I couldn't go ahead. I didn't want
to pass the car. The lane on the left was vacant and I noticed traffic
coming along up through Brentwood Road or Brentwood Parkway and
I think I was there -- I don't think I would assume that approximately
a minute, a minute and a half, right around that length of time. I was
paying attention to watch this driver ahead start, but he wouldn't start,
25 naturally, until the traffic cleared. Before the traffic cleared
or Mr. Curley had a chance to get in there I was suddenly struck from
behind and my car was sandwiched in between the rear of Mr. Curley's
car and what had struck me was the front end of this large grille, iron
grille on this very large International tractor motor vehicle.

* * * * *

Q. And when the truck struck your vehicle, what happened to
your vehicle? A. My vehicle was rammed into the rear end of Mr.
Curley's car.

I looked back, after a few seconds when I had my composure, and,

as I said, the front end of Mr. Cunningham's car or the Giant Food Center tractor was right up to the back of the station wagon. In other words, my car was in between with no space to move.

* * * * *

26 Q. I show you this picture, Mr. Thrasher, and ask you if you can tell me what that is. A. That is the result.

Q. What is the picture? It is a picture of what? A. It is the rear end of my station wagon at the time.

MR. CLARK: I will ask you to mark this Plaintiffs' Exhibit No. 1.

(Photograph was marked Plaintiffs' Exhibit No. 1 for identification.)

MR. CLARK: I offer this in evidence, if the Court please.

27 MR. ROBERSON: No objection.

THE COURT: It may be received.

(The photograph previously marked Plaintiffs' Exhibit No. 1 for identification was received in evidence.)

THE COURT: Show it to the jury. Show it to two at a time.

(Plaintiffs' Exhibit No. 1 was shown to the jury.)

* * * * *

28 BY MR. CLARK:

Q. Mr. Thrasher, after this collision, what happened to you and to Mrs. Thrasher at that time? A. At the time of the collision, I was interested in the welfare of my wife.

Q. I am talking about did anything happen to you while you were still in the jeep, when you were hit. A. I was thrown forward with a terrible jerk and a snap and I was thrown --

Q. Where was the jerk and the snap to your body? A. I was thrown into the steering wheel in the abdomen and I had my head snapped from the impact also.

29 Q. And how about Mrs. Thrasher? A. Mrs. Thrasher, I was interested in the welfare of her health. When I looked at her, she was white. I didn't notice she didn't have her glasses on at first and then I noticed she didn't have her glasses or hat on. They were later

found in the back of the car. She complained of a snapped neck and she was white and said nothing.

* * * * *

34 Q. And what time did you get to Dr. Hottel's office? A. I would say it would be around 6:00 o'clock.

Q. And then what was your condition at this time? A. My condition was being very interested in my wife, while she was being examined, and I hadn't notice anything physically except that I had had this pain in my stomach from getting the wind knocked out of me and I wanted to get home and go to bed. I wanted to get home.

Q. Had you noticed anything wrong with your neck and back at this time while you were first at Dr. Hottel's? A. Not to any serious extent; no bruises, no bruises or nothing.

* * * * *

35 Q. How many times did you go to see Dr. Hottel? A. Approximately 27 -- excuse me. The treatments he gave me some bolster shots of -- I don't know what it was.

Q. And diathermy treatments? A. And diathermy treatments.

36 Q. Did you get any relief from those treatments? A. I didn't get any relief. It aggravated it.

* * * * *

37 Q. Who was the next doctor or did you go to see some other doctor after seeing Dr. Hottel? A. Yes, I did.

Q. Who was that? A. I told Dr. Hottel about this foot thing. I didn't think he was a foot specialist and for one, I went to a Dr. Gottlieb.

Q. What was the purpose of going to see Dr. Gottlieb? A. Well, I never had any foot trouble before in my life or any other and he didn't seem to know what was the matter with this left foot, so I went to this Dr. Gottlieb and he took two X-rays of the left foot.

* * * * *

38 Q. Did he give you any treatments? A. Yes, sir.

46 Q. No, I just want you to tell us where the hernia was that you were suffering from at the time of the accident. A. Prior to the accident?

Q. That is right, prior to the accident. A. It was one that was way up high right between -- right here (indicating).

* * * * *

Q. Was that hernia in any way affected by this accident? A. Well, it seems bigger than it was, the time it came out, and then there is one below it.

* * * * *

49 After this collision did you notice any change in this hernia?

A. Yes, sir.

Q. How soon afterwards did you notice any change? A. When I first began taking treatment from Dr. Hottel.

50 Q. What change did you notice occurred? A. Well, I took diathermy treatments for a sore stomach --

Q. What change did you notice in the hernia? A. A swelling.

* * * * *

62 Q. Yes. Does any sound cause any unusual discomfort? A. That is something that is very hard to explain because I am not medical, but

63 I will say this: I reported to all of these neurologists I went to about a very queer thing and that is certain sound vibrations, upon hearing them, because I have a pain go either in the left knee or both feet but not all at the same time, either one. All don't do it. I mean in this courtroom I haven't had any trouble since I have been sitting here.

Q. What kind of sounds cause that condition? A. They could be where I work or in the home.

Q. What kind of sounds, what kind of noises? A. You mean the exact type?

Q. Yes. A. Well, the electric refrigerator when it starts on or off; a steam compressor.

Q. How about sirens? A. Sometimes your own automobile horn can do it, your own automobile horn.

* * * * *

65 Q. I believe you said that you started to go and see Dr. Hudgins about February of 1956. A. About January or February.

* * * * *

Q. Do you still go to Dr. Hudgins now? A. I still go there.

66 Q. Do you know the amount of his bill? A. I think an aggregate would be around \$250 or \$225 from that time.

Q. You testified earlier, Mr. Thrasher, about going to see Dr. Gottlieb about the foot. Do you know the amount of his bill? A. It seems he took two X-rays of each foot and there were several treatments which would have been \$6 a treatment. It was a long time ago; and \$12 for the X-rays.

Q. Let me show you this and ask you if this refreshes your recollection as to the amount of that bill. A. I assume this is for the X-rays, and 3 or 4 treatments at \$6 a treatment would be approximately around \$30.

Q. But this bill here is for \$15, which you say is for the X-rays. A. That is a prepaid one on account of it. That is right. That was payable on account.

Q. I believe that you testified that you went to see Dr. Wein. Did he have a bill? A. Yes, he did.

Q. Do you recall the amount of that? A. One was \$40 and another one was \$50; \$45. I remember exactly \$45.

Q. And I think you said you went to see Dr. O'Doherty. Do you remember what that bill was? A. \$15, yes, for a neurological examination.

67 * * * * *

Q. You went to see Dr. Forster. Do you remember the amount of his bill? A. \$25. That was just an examination.

Q. Let me ask you this: Did you ever have your jeep repaired? A. I didn't think it would warrant it.

Q. Did you or didn't you? A. Yes, some.

Q. What repairs did you have done on it? A. I had the upper glass part with the frame which was smashed. I had a tail light put on,

stop light which was smashed. The bottom tail light was left as is because, on account of the way the car maneuvered, I deemed it wasn't practical to spend all that money.

* * * * *

68 A. That work was done, just the top, that is right.

Q. In the amount of \$49.07, is that correct?

* * * * *

MR. CLARK: I offer this, if the Court please, the repair bill for \$49.07, as Exhibit No. 6.

THE WITNESS: Isn't there a \$10 labor charge also on that for installation?

(Repair bill in the amount of \$58.07 was marked Plaintiffs' Exhibit No. 6 for identification.)

MR. CLARK: It is \$58.07, a \$10 deposit instead of \$49.07.

* * * * *

73

CROSS EXAMINATION

BY MR. ROBERSON:

* * * * *

74 Q. Why did you leave your government employment? A. Why did I leave it?

Q. Yes. A. I left the government employment under certain conditions which I will explain, and the reason I left was which might have had some bearing on it.

I was working at a Grade 3 and doing grade work 8 and couldn't get my pay. I couldn't get more pay and when I started to try for more, it wasn't liked and so I got a removal notice.

* * * * *

75 I thought I was entitled to more pay and when I started searching and making appeals to the Civil Service Commission, which they heard about, it wasn't liked.

Now, I could have transferred out, just what you call was the wrong procedure, I could have transferred out.

I also appealed to the Efficiency Rating Board, which wasn't liked. I have all kinds of efficiency ratings at the time right up to the time and good conduct, good behavior, good production.

* * * * *

83 Q. Mr. Thrasher, at the scene of this accident on April 14, 1952, you didn't claim any injury at that time, did you? A. No, sir, not at that date except that I had the wind knocked out of me and the officer asked me if I wanted to go to the hospital, but there was no bruises on me. I don't know how I looked except I was nerved up.

Q. You told the officer you were not hurt, didn't you? A. They asked me if I wanted to go to the hospital, for what reason I don't know. I had no bruises; whether it was for non-composure or what.

Q. To answer my question, you told the officers you were not hurt, didn't you? A. That is what I told them, I was not hurt. I wasn't that I was conscious of; no bruises, no nothing. I know I got thrown into the steering wheel and my neck snapped and it hurts right now, right up there (indicating) when I am talking to you.

* * * * *

85 Q. And you, after leaving the police, took your wife to Dr. Hottel's office, didn't you? A. After leaving the police?

Q. Yes. A. Yes, sir.

86 Q. Did you go into Dr. Hottel's office and ask him to examine you? A. No, sir.

Q. As a matter of fact, you sat out in the car while your wife was being examined, didn't you? A. I was in the waiting station and my car was there where people was coming through the alley in Dr. Hottel's clinic and somebody had to be in the car, but I did not go there for an examination because I wanted to get my wife and go home.

Q. To answer my question, you sat in your car while your wife was examined, didn't you? A. Part of the time, yes.

* * * * *

Q. And the next day, Mr. Thrasher, you went back to your job and stayed there the entire working day, didn't you? A. The next day I

what?

Q. Went back to your job at D. C. General Hospital and stayed there the entire working day, didn't you? A. Please let me clarify

87 that --

Q. Answer yes or no and then clarify it, if you want. A. I went back to work, yes, but I didn't get into work until half past nine or ten o'clock because I didn't know whether I was going to want to make it. However, these days you have to hold a job and you won't hold it if you don't attend or make an opportunity to attend work even though you are not qualified to do the work, so when I got in at ten o'clock, I spoke to the man and I took a cab that morning. I didn't drive the car.

Q. So you stayed there the whole working day, didn't you? A. But I didn't do anything --

Q. I didn't ask you that. I said you stayed there? A. Yes.

* * * * *

Q. And then you got to Dr. Hottel. Did you tell him what your complaints were? A. Yes, sir.

88 Q. What were your complaints then? A. My complaints weren't all that I have spoken of. They were complaints previously spoken of in this room that broke down gradually.

What did I speak to him about -- I spoke to him about the head here (indicating), the neck, the shoulders. I took down my trousers -- my wife was present -- and told him I had this small hernia and showed him where I had got struck and it was getting bigger.

* * * * *

91 Q. Mr. Thrasher, when did you first notice the sound vibrations causing pain in your foot? A. It was when I was going to Dr. Hottel, yes, Dr. Hottel, because that is the reason why I went to the foot doctor.

Q. What happened when the sound vibrations occurred? A. What happened?

Q. Yes, what happens? A. It causes a cramp in the left foot.

* * * * *

Q. Is that always the same foot? A. No, sir.

Q. Sometimes the sound causes pain in the right foot and sometimes in the left foot? A. More so in the left foot than in the right foot and sometimes in this left knee.

Q. And sometimes in your elbow? A. Well, I tell you some of these pains, but definitely in the feet. Let it go at that.

* * * * *

92 Q. Does the vibration of a telephone bell cause it? A. It could, but it won't do it every time. It could be an airplane going over, they fly low around the place at Gallinger, and in the carpenter shop the saw, it does it.

Q. How about a doorbell? A. Every time a doorbell rings it doesn't do that.

Q. Does it do it sometimes when the doorbell rings? A. It has. I don't think I pay that much attention to it.

Q. It doesn't bother you very much? A. Sure, it does.

* * * * *

95 Q. Do you remember anything being said about a waiver of signature at the deposition? A. All I know is that this was being taken under oath of a stenographer who had the power to give an oath and I thought it was very funny.

Months later, when I received that deposition, I thought it was very funny that it went through as being waived, which I didn't know. I read that later after I received the copy.

96 Q. You thought your attorney wasn't taking proper care of you? A. That is what I thought. That is what I thought.

* * * * *

97 Q. You told Dr. Hottel about that foot trouble? A. Yes, sir.

* * * * *

Q. My question was, did he do anything about it? A. No, he didn't.

* * * * *

Q. And you went from Dr. Hottel to whom? A. Dr. Gottlieb.

98 Q. You went to him about what? A. The foot.

Q. Did you tell Dr. Gottlieb how your foot began to hurt? A. Yes, sir.

* * * * *

Q. My question is: Did you tell Dr. Hottel you hurt your foot in an automobile accident? A. Yes. He asked me questions and they drew it out of you.

99 Q. And in his report, he said you said you dropped some furniture on your feet? A. Yes, I understand all about that. That is a big surprise.

* * * * *

How many times did you go to him? A. Three or four times.

Q. And he didn't do you any good, did he? A. I couldn't see that he was because it just kept hurting. I would like to finish that question.

* * * * *

100 Q. But you did say you dropped some furniture on your foot, didn't you? A. That is what come out afterwards and I assume that -- that is what I found out.

Q. Getting back to Dr. Hottel, Mr. Thrasher, you didn't really think that Dr. Hottel knew what it was all about, did you? A. Well, he told me it was a type of arthritis from an injury.

Q. My question is, you didn't think Dr. Hottel knew what it was all about, isn't that right? A. I certainly thought when I went there, but after going 27 times and later I found out that heat aggravates the situation and it aggravates the disc that was found, I thought I had been wasting a lot of time and maybe I would have gotten a better start and not been where I am today.

101 Q. You came to the conclusion that Dr. Hottel didn't know what it was all about? A. I have a reason.

Q. My question is, that is your conclusion? A. Yes.

Q. You thought these diathermy treatments he was giving you were aggravating your condition, is that right? A. They were aggravating it. They didn't do any good.

Q. So the next doctor you went to was what doctor? A. Dr. Gottlieb.

* * * * *

102 Q. I asked you if Dr. Wein sent you to Dr. Francis Forster, who is now the Dean of Georgetown University Medical School. A. Yes.

* * * * *

103 Q. You eventually saw Dr. Forster's report to Dr. Wein, didn't you? A. A long time afterward.

* * * * *

Q. It recommended psychiatric treatment for you, didn't it?
A. It recommended but there are a lot of things it didn't recommend.

104 Q. Did you do what it recommended, have psychiatric treatment?
A. Gentlemen, in this room do you think that if I met up with three doctors who would withhold reports for a year and send bills in between that I would have confidence in the first one or two doctors I had seen?

MR. ROBERSON: Will the reporter please read back my question?

THE REPORTER (reading):

"Q Did you do what it recommended, have psychiatric treatment?"

THE WITNESS: No, I didn't do that. I didn't know about it, but I knew about my pains.

BY MR. ROBERSON:

Q. When you did know about the report, did you have any psychiatric treatment? A. About a year after --

Q. Did you have some? A. What?

Q. Psychiatric treatment? A. No, sir.

Q. Did you conclude that Dr. Forster didn't know what it was all about? A. Well, I explained the situation and he just didn't pay no attention.

105 Q. Did you conclude that he didn't know what the trouble was?
A. I concluded that he might have known but wouldn't get into it.

Q. You mentioned Dr. O'Doherty. Who sent you to Dr. O'Doherty?

A. Dr. Wein.

Q. And did you get a copy of Dr. O'Doherty's report? A. I saw it.

Q. He didn't think you had any neurological basis for your complaints, did he? A. You mean his opinion?

Q. That is right. A. That was his opinion. In his report, he deleted all of these symptoms of which I gave my time and money to get from him.

Q. You went to him for his opinion, didn't you? A. I was sent to him. I didn't pick him.

Q. Dr. Wein wanted to get his opinion, in consultation, just like Dr. Forster, isn't that right, sir? A. But the consultation was kept from me.

Q. It didn't come out the way you thought it would, did it? A. The way I thought it would?

Q. Yes. These doctors didn't give you the kind of report you thought they would? A. They couldn't if they deleted on the report factual symptoms which I was in distress. They couldn't give a report
106 if they delete the symptoms after you tell them after the report comes out.

* * * * *

112 Q. This was more than a year after the accident before you first went to Dr. Terrafranca, is that right? A. That is right.

Q. And he didn't give you any treatment, Dr. Terrafranca?
A. No; I went there for X-rays, for diagnosis.

Q. As a matter of fact, none of the doctors in between Dr. Hottel, the first man you went to, and Dr. Hudgins, who is an osteopath over in Arlington, none of those in-between doctors gave you any treatment, did they? A. Yes.

Q. Which ones? A. Dr. Gottlieb, I told you. He put my left foot in hot wax a couple of times, two or three times. Did I tell you that? Wasn't I asked that question?

113 Q. I don't recall anything about hot wax. A. Well, he did. He did do that, outside of taking X-rays, but he didn't know. He just put my left foot in to find out what the outcome would be.

* * * * *

115 Q. You had told Dr. Terrafranca all about your complaints, about your pains in your head, arms, and your feet and other portions of your body, hadn't you? A. He asked me.

Q. You told him all about your complaints, didn't you? A. Yes, sir.

Q. And then he told you he didn't want to be involved in your case?

A. Oh, no.

Q. Didn't he tell you that, sir? A. He told me that after -- do you want me to go in detail again -- he told me that four months afterwards, four months afterward, and I don't know how it did happen -- oh, I will tell you how he happened to, and I would like to bring that point out.

* * * * *

117 Q. I just asked you if Mr. Earl Davis was your first or second attorney. A. The first.

Q. And you felt he did not handle it well with Dr. Terrafranca?

118 A. No, he sent out these aggressive letters to all of these doctors and they got mad with me. Terrafranca told me with his own mouth.

* * * * *

119 Q. Both Dr. Gallagher and Dr. Terrafranca recommended that you have a myelogram so that they could see whether there was anything objectively wrong with you, didn't they? A. But they didn't tell me that
120 there was a calculated risk starting at the neck and that you had to sign for one in the hospital if anything happens.

Q. My question is that both of them recommended that you have one, didn't they? A. They asked me if I would have one.

Q. And you refused to have it, is that right? A. I refused on the conditions I just told you, that it was dangerous.

Q. You haven't been hospitalized any as a result of this accident, have you? A. Been hospitalized?

Q. Yes, you haven't been placed in a hospital as a result of this accident, have you? A. No, I have not, no, sir.

* * * * *

121 Q. Among other things, Dr. Gallagher tapped up and down your cervical spine, didn't he, to see if there was any tenderness there?

122 A. Well, he did things but he didn't know about these X-rays Dr. Terrafranca took later.

* * * * *

Q. Dr. Gallagher just felt that it was difficult to assess your case, didn't he? A. In spite of the fact that I told him everything that
123 I could.

Q. And you felt that he should have sent for some more X-rays?
A. I took them to him and he refused to look at them unless I wanted a myelogram.

Q. He indicated he didn't think you were cooperating with him?
A. You know doctors, a lot of them like to get you in a hospital to take a myelogram and then you don't come out until you get your operation because most operations are postoperative to myelograms and I was afraid. You have to sign to have a myelogram taken.

* * * * *

124 Q. Dr. Wein didn't attribute this hernia to the accident, did he?
A. You remember there is two of them.

Q. Either hernia. A. Either hernia. Now, I don't know what he meant. He claims to have examined my wife but he never did, and there are a lot of things that just was never put in the report that was put in right. You must remember that this upper one, or small one here, was always here, which was an aggravation, and this is where this drops out when I don't have this thing to hold it back.

Q. As a matter of fact, didn't Dr. Wein report that he had observed a gastric hernia that was not the result of an accident? A. Is that what he said? Didn't that Dr. Gottlieb say I had dropped a piece of furniture on my foot which I never said?

* * * * *

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128 Q. I am asking you how many hernias you have had. A. Would you mean the stomach hernias?

THE COURT: All kinds of hernias. Let's get on with this case.

129 THE WITNESS: Two.

BY MR. ROBERSON:

Q. When was the first one? A. Years ago.

Q. How many years ago? A. I would say over 27, on the side.

Q. Where was it located? A. The hernia?

Q. Yes, sir. A. A little bunch --

Q. On the right down low, is that right, sir? A. I haven't had it for so long, I have forgotten whether it was to the right or the left.

Q. You don't know whether it was on the right or left side?

A. It was on the right.

Q. You had an operation, didn't you? A. Yes, I did.

Q. You didn't have any further trouble after that? A. No, sir.

Q. What caused that hernia? A. If I remember right, the doctor said it was a slight strain, years ago.

Q. How did you get the strain? A. I wouldn't know.

130 Q. Were you aware of it at the time you got it? A. No.

Q. Then when was the next hernia you got? A. I can't say exactly when.

Q. Tell me approximately when was the second hernia that you got. A. I noticed just a slight bulge here (indicating) about 5 years or 10 years ago.

Q. How did you get that? A. I wouldn't know.

Q. You weren't aware you got that? A. No.

Q. Did you have that one operated on? A. No, sir.

* * * * *

131 Q. I am talking about hernias. Since this accident you have noticed what you say is a third hernia? A. I wouldn't be able to tell if it is this one that was aggravated or another one below it. I would leave that to medical.

Q. No doctors told you that this hernia that you are complaining of now was caused by this accident, have they? A. I don't know why they would if it wasn't the accident.

Q. To answer my question, no doctor has told you that this hernia you are complaining about now was caused by this accident, have they?

A. They didn't say it was. It could be.

* * * * *

133 THE COURT: Let me ask a question.

BY THE COURT:

Q. Do you now have one hernia or two hernias? A. Sometimes
134 it appears that one has been aggravated or else it has all gone into one. Nobody has ever told me.

Q. You don't know whether you have one or two, is that correct?

A. It looks like two. It is two bulges.

Q. You had a slight bulge before the accident? A. In a different location.

Q. Up in the region of your lower chest, is that correct? A. Yes, right in here (indicating).

Q. Now, you have another one further down your abdomen, is that correct? A. But the two kind of run together.

Q. You answer my questions.

When did you notice the swelling of the one lower down with reference to this accident? A. Within a week or so.

Q. The one lower down showed within a week after the accident?

A. A swelling on the abdomen.

Q. Down low? A. Approximately.

Q. You noticed no swelling on the one at the lower part of your chest after the accident? A. Not particularly.

Q. Did you notice it at all? A. Yes.

135 Q. Was that swollen? A. Slightly.

Q. Slightly? A. I would say. It is a long time ago.

Q. I want your best recollection. If you don't know, I want you to say so.

You noticed a slight swelling at the locality of the swelling you had?

A. Yes, sir.

Q. In the lower chest region prior to the accident? A. Yes, sir.

Q. And then you noticed a second swelling further down within a week after the accident? A. Yes, it was sore before the accident.

Q. You noticed the swelling? A. Not before; I mean between the time of the accident and a week that I noticed the swelling, it was sore between that time, if I can get that right.

Q. Did you notice a swelling? A. Yes.

Q. Was the swelling as large as it now is or was it smaller?

A. Very small.

136 Q. And it has been progressing and getting larger as the years pass, is that correct? A. Yes, sir.

THE COURT: All right.

* * * * *

151 DORIS MAY THRASHER

was called as a witness in her own behalf and, having been first duly sworn, was examined and testified as follows:

* * * * *

154 Q. And after the accident occurred, after the car was struck and your car was knocked into Mr. Curley's automobile, what happened to

155 you at the time your car was struck? A. At the time it was struck, I was thrown with a terrible jerk.

Q. How were you thrown, backwards, forwards, or how? A. I was thrown in such a way that I must have been both frontward and backward because I later found out my hat and glasses were in the back of the seat. I was thrown with a terrible jerk, I know.

Q. What part of your body did it jerk, if any? A. My head and neck and shoulder.

Q. Were you injured at the time? A. Well, I was very badly shaken up and everything, surely.

Q. Keep your voice up. A. I was very badly shaken up. I didn't know what the extent of my injuries were then.

* * * * *

157 Q. Then after you left the scene of the accident and where you went to talk to the police officers or your husband and Mr. Cunningham to talk to the police officers, where did you go after that? A. We went directly to Dr. Hottel.

Q. You went to Dr. Hottel's office? A. Yes.

* * * * *

Q. And what was the reason for your going to Dr. Hottel's office?

158 A. Well, because I was very badly shaken up and stunned, sort of like, and I went and told him that I was very badly shaken up and my neck and head snapped and my shoulder hurt.

Q. Did Dr. Hottel prescribe any treatment for you that night? Did he give you any treatment? A. He told me to -- no, that night. I believe he gave me diathermy treatment that night.

Q. Then did you take subsequent treatment from Dr. Hottel? A. Oh, yes.

Q. What kind of treatment did you take? A. Diathermy treatments.

Q. How many of them did you take, approximately? A. 20, I believe.

Q. And how many times did you go to see Dr. Hottel? A. Well, I went there about 20 times but I didn't see him all the time.

Q. During this period of time, what was your condition? What were you suffering from, if anything? A. A very stiff neck and pain in the head and shoulder.

Q. And did that condition improve after going to him for a long time? A. No, I had it for a long time. In fact, I still have it. I don't have it as much. It is better now than it was then, of course.

159 Q. What trouble do you have now? A. Well, I have sort of a dizziness feeling sometimes, sort of a pressure in my head sometimes.

Q. During this period of time that you were going to Dr. Hottel, were you suffering any pain? A. Oh, yes, pain in the head and the neck and the shoulder. I couldn't move my neck for some time.

Q. Was that painful at the time or not? A. That went on for

several months like that. My neck was stiff. I couldn't move it.

Q. You mean you couldn't turn your head? A. No.

* * * *

Q. Did you lose any time from your employment? A. No.

* * * *

160 (No response.)

Q. Mrs. Thrasher, did you have a family doctor at that time?

A. No, I had this Dr. Hottel. I had only been to him, I think, 2 or 3 times, a couple of times before that I had been to him, but we really didn't have any family physician. I went to him through the recommendation of another girl.

Q. Did you go to see Dr. Hottel some week or so prior to this accident? A. Yes, I did. I went there. I had a physical examination. It happened to be just ten days before the accident.

Q. It happened to be what? A. Ten days before the accident and he gave me a thorough physical examination.

Q. How long did this pain which you had continue as a severe pain?

A. Oh, for a long time it did but not, you know -- of course, it wasn't as severe as it was at first.

Q. You say a long time. You mean six months, eight months, ten months? A. Maybe a year or more.

Q. A year? A. Yes.

Q. How often do you have difficulty with it now? A. Well, every once in a while.

161 * * * *

Q. What pain do you have now? A. Well, I have a pressure in my head now sometimes and also a dizziness feeling.

Q. Did you have any of that prior to this accident? A. I never had it and then I had an illness in '54 which was quite serious, I guess, and had vomiting and dizziness, vertigo, I believe they call it.

* * * *

166

CROSS EXAMINATION

BY MR. ROBERSON:

* * * *

167 Q. And you went one time to Dr. Arthur Wein while your husband was being seen by him, didn't you? A. Yes.

Q. And that was in July of 1952? A. Yes.

Q. And you told him about your complaints and your back and so forth, didn't you? A. Yes.

Q. And he told you that he couldn't associate that with the automobile accident? A. No, he didn't tell me that.

Q. Did you see a copy of his report? A. I have seen a copy since.

Q. Pardon? A. I have seen a copy since that time. He did not examine me.

Q. I didn't ask you that. He said that in his report, didn't he? A. Yes.

Q. And he gave you some advice on posture and home routine, didn't he? A. He said it could be posture.

* * * * *

168 ROBERT RAY HOTTEL

was called as a witness by the plaintiffs and, being first duly sworn, was examined and testified as follows:

* * * * *

169 Q. And how long have you practiced medicine? A. I am ashamed to tell you -- 37 years.

Q. And you are a general practitioner, Doctor? A. Right.

* * * * *

Q. Doctor, did there come a time that you saw a Mrs. Doris May Thrasher? A. I did.

170 Q. And when was that, Doctor? A. April. I have to look at the report. That is way back in '52, April 14.

Q. Of 1952? A. Right.

Q. Doctor, had you seen her prior to that time? A. Yes, I had known this Mrs. Thrasher for several years.

Q. Could you tell us what date, prior to April 14, you had seen Mrs. Thrasher? A. April 3.

Q. And what was the reason for her coming to see you on April 3? A. She had missed her menstrual period on September 9, 1951. She was then having irregular periods in March.

Q. Did you give her a physical examination? A. I gave her a physical examination at that time, yes.

Q. On April 3? A. Yes.

Q. Did you find anything wrong with her on April 3? A. No.

Q. You did not? A. No, sir.

Q. The next time you saw her was on April 14th, I believe you said. A. April 14.

171 Q. Was that in the morning or the evening, do you know? A. I don't know.

Q. What did she come to see you on April 14, 1952, for? A. On account of having been in an automobile accident. She said that she was hit from the rear and that it bumped her considerably and she said the sudden impact of the thing had jerked her.

Q. Did you examine her at that time? A. Yes, sir, we did.

Q. What did you find? A. Well, we couldn't find too much. Her neck was tender. It was more a subjective thing than it was objective. She complained of her neck hurting her on motion and also of her left shoulder hurting her.

Q. And did she subsequently come back to you for treatment? A. Yes, she came for a long time.

* * * * *

172 THE WITNESS: This man and this woman came to me, having been in an automobile accident in which they were hit from behind and the sudden impact of the blow jarred them like that, like it would anybody else, and caused them to have what I diagnosed as muscle strain
173 in the neck and shoulder.

THE COURT: You are talking about both of them?

THE WITNESS: I am talking about both of them. They came to me a goodly number of times and we couldn't do much with them. I mean, they just kept on hurting and hurting and hurting.

We couldn't find much physical evidence. We X-rayed their necks and we found nothing; shoulders didn't reveal anything, but still they hurt.

* * * * *

175 Q. How much was your bill for Mrs. Thrasher? A. I don't know.

Q. You don't have the amount there? A. I have the combined family.

* * * * *

Q. Will you tell us the amount of the bill for Mr. and Mrs. Thrasher as a result of the automobile accident? A. \$156.

176 * * * * *

Q. Will you tell us when Mr. Thrasher came to see you, if ever? You said he did. When did he come? A. April 15.

Q. And when he came to you what did he complain of at that time? A. He said, "I want my neck examined on account of an automobile accident," which he was in and hit from the rear by a truck and thrown forward. His neck and right shoulder hurt. The diagnosis, "sprain in the neck muscle."

Q. Did you examine him at that time? A. Yes.

Q. And what did you find on your examination? A. I found that he had muscle sprain in the muscle of his neck.

Q. How did you determine that, Doctor? A. You determine it by physical examination, by having the patient bend his neck backwards and forwards, by palpation of his neck. I had him turn his neck from side to side.

177 Q. And you found that he had muscle sprain? A. That was my diagnosis.

* * * * *

Q. How many times, during this course of treatment, did you yourself, see Mr. Thrasher, do you know? A. I would see him, I mean,
178 a couple of times a week. I wouldn't see him every time but enough to know what it was all about.

Q. What kind of treatments did you give him? A. Diathermy treatments.

Q. Is that the only treatment you gave him? A. The only kind of treatment.

Q. Did you make X-rays? A. We made the X-rays.

Q. Did you make them? A. No, Dr. Engle, who is in my office.

Q. Did you read the X-rays yourself or did Dr. Engle? A. I read the X-rays.

Q. What you did, Doctor, not what somebody else did. Did you read the X-rays? A. I read the X-rays.

Q. What was your finding on the X-rays? A. No evidence of fracture or dislocation of any of the bones of the neck or shoulder.

Q. That was your reading and not what somebody else told you?
A. That was mine.

Q. You are not a radiologist, are you? A. No, sir.

* * * *

180 Q. I ask you if this is a copy of a letter that you sent to Mr. Earl Davis.

MR. ROBERSON: What date of what letter?

MR. CLARK: June 18, 1953.

THE WITNESS: This is my letter.

* * * *

181 Do you want me to read the rest of it?

Q. Yes, you can read the rest of it. A. (reading) "We have never been able to determine any real injury to Mr. Thrasher by diagnosis or X-rays."

* * * *

Q. I mean did he tell you that he had been struck in the stomach?
A. No, sir, he hadn't been struck in the stomach. He hadn't been struck at all. The automobile had been hit in the rear and jerked him.

Q. Did he tell you his stomach was hit against the steering wheel?

182 A. He didn't complain of that. He only complained of his neck and shoulders.

Q. Then it is your testimony when he came to see you he had no hernia? A. I have no recollection of a hernia.

* * * *

Q. Did you ever give him any therapy treatments to the stomach?

A. No, sir.

* * * * *

Q. Would you check that to be sure? A. He had diathermy to his back, if that is any help to you.

Q. I am sorry, I didn't hear the answer. A. I said, I had a record here of his having had diathermy to his back and also the patient had been drinking lots of beer, if that is any help to you.

Q. Of course, that is not much help, Doctor. My question is whether or not he had any therapy treatments to his stomach or any other treatments to his stomach. A. Diathermy treatments to the back of his neck and shoulder.

183 * * * * *

Q. Did you find any record of having given Mr. Thrasher any treatment for his stomach? A. No, sir.

Q. Do you know whether or not your nurses gave him any treatment? A. I know not.

Q. For the front of his body? A. No, sir.

Q. They might have given him treatments and you not know anything about it? A. They might have given it to his foot, for all I know, if he asked for it, but I have no record of it. We treated him for the
184 neck and shoulder.

Q. Diathermy treatments might have been given for his stomach and you not know anything about it, is that correct? A. Not apt to be, because they would have asked me. If they told me he complained of his stomach -- of course, Dr. Engle was there with me. He might very well have asked him, too. I couldn't say for sure.

* * * * *

185 Q. Did he complain to you at any time that the diathermy treatments were not doing him any good? A. He kept coming. He must have liked them. He seemed to.

Q. Do you think he needed them? A. I doubted it.

Q. Would you have given them to him if he didn't need them?

A. If a man complains about pain -- I couldn't find any real finding -- but if a man comes to me and says, "My head aches," I believe it aches. If he says, "My foot hurts," I believe it hurts.

Q. Did you think Mr. Thrasher had any pain? A. Yes, that is why we treated him.

Q. Why do you say now you doubted if he needed treatment?

A. I didn't say I doubted it. I said we couldn't find any real injuries to his neck.

Q. Would you say now he did need the treatments? A. Yes, we treat them when they come in and complain of pain.

* * * * *

186

CROSS EXAMINATION

BY MR. ROBERSON:

Q. Doctor, these records that you have here, do you make them out at the time you see the patient? A. Those slips are brought to my desk and I make entries on them of anything of any importance. Otherwise, the nurses will put on diathermy treatment or whatever was done, what they do.

* * * * *

187

Q. What do your records say with respect to Mrs. Howard Thrasher on April 14, 1952? A. "In auto accident, hit from the rear. Injured her back. Hurt left shoulder."

Q. What further? A. This record here (indicating) was put on by Dr. Engle, whatever is down here. (Reading) "No apparent injury"--

MR. CLARK: I object to that, if the Court please.

THE COURT: I sustain the objection.

BY MR. ROBERSON:

Q. You mean the records you have been testifying to are not all your records? A. This handwriting here was made by Dr. Engle. When he treated the patient, he made an entry.

Q. What is the date of that? A. April 14.

Q. Didn't you see her the first time she came in? A. Yes, sir.

Q. Aren't you the one that would have made the entry on that date?

A. This is my record, my handwriting that I have here, but this other (indicating), "No apparent injury," was written by Dr. Engle.

188 MR. CLARK: I object to that.

THE COURT: Sustained.

MR. CLARK: I ask that the jury be instructed to disregard the answer.

THE COURT: The jury will disregard it.

* * * * *

BY MR. ROBERSON:

Q. Is this handwriting yours (indicating)? A. Not here (indicating), but this is my record here (indicating).

Q. The slip regarding Mr. Howard Thrasher on April 25, 1952, the remarks under "Complaint, History, Diagnosis, and Treatment" are in your handwriting? A. This is all mine (indicating). This entry here (indicating), that is the patient's name.

Q. Read the portion of that record that is in your own handwriting, Doctor. A. (Reading) "Enseals of sodium salicylate, grains 15; after meals for sore back. Hurts to move. No pathology found."

Do you want the rest of it?

Q. Yes. A. (Reading) "Probably trying to set up" --

MR. CLARK: Object to this. This is a conclusion, if the Court please.

189 MR. ROBERSON: It is the Doctor's contemporaneous impression in the witness' own handwriting.

THE COURT: I think that is objectionable so far as you are reading a record. You may ask the Doctor what is his present opinion as refreshed by that document as to whatever the matter is you wish to bring out.

MR. ROBERSON: Thank you, sir.

BY MR. ROBERSON:

Q. Doctor, is it your impression that Mr. Thrasher was trying to set up a personal injury claim? A. Mr. Thrasher kept -- I can't answer that yes or no -- but I will answer it as I saw it. Mr. Thrasher,

we couldn't demonstrate any real injury, yet he came and came and came and came for treatments, complaining of his back, his neck hurting and, naturally, we kept on trying to get him well. After a while it began to look suspicious to me. We have a lot of people like that. Their backs won't get well. If you hurt your back, it won't get well until you get to the insurance claim. Their back won't get well. I don't know whether this is so or isn't so.

Q. And your impression on April 25, 1952, is that he was trying to set something up?

MR. CLARK: Object to that.

THE COURT: Overruled. This is cross examination.

MR. CLARK: The witness has answered.

190

THE COURT: He can use the Doctor's writing to impeach him if he wants to.

MR. ROBERSON: Will you read the question, please?

THE REPORTER (reading):

"Q And your impression on April 25, 1952, is that he was trying to set something up?"

BY MR. ROBERSON:

Q. (continuing) Set up a personal injury claim? A. Probably trying to set up an insurance case to collect insurance. That was my impression. I don't know whether it is so or isn't so. I can't say but I just couldn't find anything wrong with the man. He kept coming and kept complaining.

Q. And is that still your opinion? A. Do I have to give one?

Q. You can answer yes or no, whether that is still your opinion. A. Well, I just don't know whether it was or whether it wasn't. In all fairness to the man, I thought he was hurt and that is why we treated him on an honest basis. We don't treat people any other way. I mean our office stands for what is right and only for what is right.

Q. I am sure it does, Doctor.

I show you a photostat of a letter dated June 18, 1953, concerning part of which counsel for the plaintiff asked you on your direct examination. Did you write that letter? A. I did.

191 Q. Did you report in that letter that your examination of Mr.

Howard Thrasher on April 15, 1952 was negative so far as any apparent injury was concerned? A. As far as physical findings were concerned, as far as bone injury -- you understand, you can't tell. You tear your muscle, like a charley horse. You can't demonstrate that. You have to accept --

Q. Doctor, referring to the second sentence in the second paragraph of your letter, did you report that examination at that time was negative so far as any apparent injury was concerned? A. That is as far as this physical examination is concerned.

Q. Did you report what I read? A. Yes.

* * * * *

192 Q. What was your reading of your X-rays? A. Negative.

Q. No bony injury? A. No bony injury.

Q. Did you report further to the attorney more than a year after the accident that, "We have never been able to determine any real injury to Mr. Thrasher by physical examination or X-ray"? A. We did.

Q. And coming to Mrs. Thrasher, did you report that she was treated off and on, about twice a week through July 25, 1952? A. I did.

Q. (Reading) "No pathology was demonstrated"? A. (Reading) "No broken bones. No real pathology that we could demonstrate."

193 Q. And you said on your direct examination that most of these complaints were subjective. What do you mean by that, Doctor? A. I mean people feel pain. That is subjective but objective pains are things that you find yourself.

Q. In other words, there was nothing you could personally see to confirm -- A. No, I think the woman had pain and I think he had pain.

Q. I didn't ask you that. Subjective is something they say that you can't confirm, is that right? A. That is right.

* * * * *

201 Q. Doctor, assuming that you saw the hernia on this man in 1951; that it did not enlarge from that time until April 14, 1952; that on April 14, 1952, he was struck in the stomach with the wheel of his automobile,

having been struck by another car in the rear and thrown forward into the steering wheel, and that he came to see you on April 15, at which time he did not complain of the stomach condition -- I believe was your testimony -- and that subsequent thereto the hernia began to enlarge and that it was noticed enlarging 2 or 3 weeks after the accident, would you, in your opinion, say that the blow from the steering wheel in the stomach caused the enlargement of the hernia? A. I don't think -- those are not the facts.

THE COURT: No. You answer the question on the basis it is a hypothetical question, if you can answer it.

THE WITNESS: I will have to answer it like that.

If a man had a hernia and he was hit by an automobile steering wheel jammed into his abdomen, would it enlarge, but this man did not complain of the stomach. He complained of his neck and shoulder and that is what we treated him for.

BY MR. CLARK:

Q. If he was struck in the stomach, you would expect, in your opinion, the hernia would be enlarged, would it not? A. That is a problematical thing.

Q. Would you answer, please, yes or no?

202 THE COURT: He said it was problematical.

You mean you cannot express an opinion?

THE WITNESS: I cannot say positively. I still have in my head I did not treat him for any hernia. He did not complain of any hernia and the only thing pertinent in this thing, of course, it is not my business, but is his neck and shoulder. That is what we treated him for.

BY MR. CLARK:

Q. Isn't it your statement that he had a hernia and he was struck in the stomach, that you would expect it to enlarge? A. I would go along with that. It is possible it could be enlarged and it is possible it could not have been enlarged. But, behind that, if a man had been hit in the stomach by a wheel like that, he would have complained of his stomach. He would have had pain. He would have been retching and he would have

complained about that instead of up here (indicating) in his neck.

Q. Even though he did not complain of those things, do you say it could have occurred? A. He could have had hemorrhoids from the same thing.

Q. Could the hernia have been enlarged because of the blow?

THE COURT: You are cross examining your own witness. That is not the way to phrase the question, as you know, Mr. Clark.

203

BY MR. CLARK:

Q. In your opinion, if he was struck, would the hernia have been enlarged in the stomach? A. I rather think so, if he had had a hernia already and if he had been hit in the stomach, it certainly would not have done it any good.

Q. It would have enlarged it? A. I would think so. It certainly would have enlarged it rather than make it smaller, if it changed it at all.

* * * * *

RECROSS EXAMINATION

BY MR. ROBERSON:

Q. Doctor, how long have you been practicing medicine? A. 37 years.

Q. And you would expect, if such an injury had been received in the stomach from a steering wheel sufficient to bother this old hernia, that there would have been some retching and complaints of pain contemporaneously? A. He would have had to complain of distress or pain of the tummy. He complained of his neck and shoulder. That is what he complained of.

Q. So, in your opinion, based on the fact that he didn't complain to you, this enlargement that showed up later, was not due to this accident of April 14? A. I don't think so, sir.

* * * * *

204

RAYMOND JOHN TERRAFRANCA

205

was called as a witness by the plaintiffs and, being first duly sworn, was examined and testified as follows:

* * * * *

206 Q. Have you any specialty, Doctor? A. Yes, radiology.

* * * * *

207 Q. Did you X-ray his neck at that time? A. At that time I X-rayed his neck and, because of my findings, I had a consultation --

Q. With whom? A. With Dr. John Gallagher, the neurologist.

208 Q. With reference to the neck, what were your findings? A. He had a narrowing of the fifth regional interspace.

* * * * *

210 Q. You can't tell us what Dr. Gallagher said, now. You just tell us if you did any other examination or X-ray of Mr. Thrasher.

A. I am getting to what my next step was here.

It was recommended that he have a myelographic study and that he refused to have done. When he came back, he stressed that he had other complaints and he had these pains in his foot. He said that an unusual

211 sound or sudden sound, like the ringing of a telephone or the honking of an automobile horn might set up this feeling that he had in his foot.

Although I knew an injury up in the cervical region could cause changes all the way down if the spinal cord was involved, not just those nerves that we are talking about, I decided I would X-ray his spine lower down and I X-rayed his thoracic and lumbosacral spine.

Q. What did that demonstrate? A. The films are there (indicating). Do you want me to show that?

Q. Yes, would you show that? A. I might just as well go over the thoracic spine. He also complained of these pains radiating down to his upper back. Because of that, I X-rayed this thoracic spine. That is the spine that goes from the neck region to the last rib and I did not see any evidence of injury. He has got minor arthritic changes. That means little spurs off these vertebral bodies, with and without symptoms.

In the lumbosacral spine, which is this part (indicating) of the spine, from the ribs down, I found a narrowed interspace at this level (indicating).

Q. What is the name of that level? A. That is a lumbosacral

interspace but he had a congenital defect here (indicating) that he was born with. He has only four that look like lumbar. Most of us have five.

212 He has sacralization of the fifth and what would normally be the fifth lumbosacral space would be one space higher. Here again, we have disc space between these vertebrae. See how wide they are, here and here (indicating), and see how narrow this one is (indicating).

The narrowness is significant. Something has happened to this disc, also not simply because this is narrow. We can still have a narrow interspace at this level (indicating) without any trouble, just as instead of this vertebra being separate, like these (indicating), it has joined the sacrum, so the space between those vertebrae can be narrowed without any trouble at all.

However, in this particular space (indicating), we have a lifting or bridging. That means there has been undue stress, trauma, and this vertebra (indicating), instead of being lined up with these (indicating), this one comes backward. I think you can all see that distance there (indicating). Instead of this line being continuous down this way (indicating), the sacrum is displaced back in relation to the fourth lumbar vertebra.

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213 Q. How would you describe that condition which you have just mentioned to us? What was your description? A. All that I can say is that he has a narrowed lumbosacroiliac interspace with forward slipping of the fourth lumbar vertebra.

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214 Q. In your opinion would that trauma, which he sustained, have caused these conditions which you have described? A. In all honesty I cannot say that they would or they would not.

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215 Q. In your opinion, did the trauma aggravate the condition that was then existing, as he described it to you? A. I am in no position to answer that honestly. The period between when the accident happened and when I saw him is just too long. I cannot pass that judgment.

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216 CROSS EXAMINATION

BY MR. ROBERSON:

Q. Doctor, you sent Mr. Thrasher over to Dr. Gallagher because

you thought a neurosurgeon or specialist should evaluate the man's complaint, didn't you? A. I did, yes.

Q. And both you and Dr. Gallagher thought he should have a myelogram, didn't you? A. We did, yes.

Q. Why did you think he should have a myelogram, because you wanted to have some objective demonstration of a disc injury? A. Well, we felt that if he wanted us to do something about it, we would have to have more information about the condition so we could judge just what to do next.

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217 Q. And though this man wanted something done, he wouldn't agree to have the test made? A. He would not have one done.

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218 Q. And your X-rays did show some osteoarthritis? A. He has some osteoarthritis changes and he has marked arthritic conditions in his fourth lumbosacral region.

Q. And they can cause back pain? A. They certainly can, yes.

Q. And they usually appear when a person is in his 40's or 50's, don't they? A. I should think so. You see, they quite often appear around 50.

Q. Did you know how old Mr. Thrasher was at the time you saw him in 1953? A. I think he was about that age. I don't recall, exactly.

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219 Q. And you did not interpret this osteoarthritis to have been caused by this accident, did you, Doctor? A. No.

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BY THE COURT:

Q. Doctor, do I understand that an interspace is the same as a disc? A. The interspace is the space that contains the disc.

Q. When you spoke of a narrowed interspace, did you mean a narrowed disc? A. Well, the question is mute. We cannot see the disc. I don't know whether the disc shrunk, whether it degenerated and dried up, whether it fragmented, whether it broke the fibrous tissue around it and ruptured out. Therefore, the flattening out that way. I don't know what has happened to the disc.

Q. You did not find, then, a herniated disc? A. We found evidence that would lead us to think that there is a good chance of him having one.

220 Q. But you wanted the myelogram? A. To confirm or disprove it one way or the other, yes. That was our next step.

Q. So you found a narrowed interspace? A. In two places, in the neck and one down at the lumbosacral region. How long they have been there, I don't know. I can't see the disc on those films. These are indirect findings.

If the space is narrowed, then we know there isn't a disc of normal size in that area. What has happened we cannot say because we cannot see it.

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MR. ROBERSON: Doctor, as you get older, they can just dry up the space?

THE WITNESS: Yes, they can.

MR. ROBERSON: Without any trauma, isn't that right?

THE WITNESS: That is true, yes.

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222 LELAND E. STEVENSON

was called as a witness by the plaintiffs and, being first duly sworn, was examined and testified as follows:

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223 Q. Dr. Stevenson, directing your attention to October 25, 1955, did you have an opportunity at that time to make an examination of Mr. Thrasher? A. Yes, sir.

Q. Will you state the complaints which Mr. Thrasher gave you, the history briefly and your findings? A. Mr. Thrasher stated that on April 14, 1952, while he was stopped in, I guess it was a jeep station wagon, that he was hit from the rear by another car and bounced 7 or 8 feet into the rear of the car that was ahead of him and that, apparently, he was thrown up against the steering wheel of the jeep station wagon which he was driving.

He stated that since that time he had been having difficulty, principally with his neck, his shoulders, his low back and his abdomen; that he had had changes in sensation of particularly the left extremity, the arm and the leg.

* * * * *

Q. Did he describe that as a weakness or not? A. Not particularly a weakness as a change in sensation.

Q. Go ahead. A. In his abdomen wall he stated previously he had been able to get along all right, but since this time his abdomen wall had begun to bulge.

On examination, a gross examination, there was some spasm around the muscles of his neck, the lower back and what we call a
224 hypoesthesia.

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Q. Will you start again at the findings so his Honor will be able to keep track of it? A. Abdominal examination revealed a rather large
225 ventral hernia; weakness of the abdominal walls which allows the viscus to protrude some degree. A hernia is an opening in the tissue which extends the bulging of the viscus behind that. This ventral hernia, around the umbilicus was rather well marked; then the hypoesthesia, which I have mentioned, the decrease in the sensation in the left face and leg, in his leg particularly below his knee; tenderness and spasm. Spasm is something that you could elicit on examination around the neck muscles, vertebral muscles, and the same in his low back. There is some spasm.

His movements, bending, squatting, stooping, twisting, were, although difficult to evaluate, I thought they were limited to some degree.

On X-rays, I had the opportunity to compare some X-rays that had been taken with the ones that we obtained in the office. There was little or no change. It showed some narrowing between the fifth and sixth lumbar vertebrae in the cervical region. That was the most, and some osteoarthritis, changes sometimes we observe with increasing age and wear and tear on the bones.

I think, in going more into detail on the X-ray, there was some hypertrophy, that is, increase in bony structure, especially around the edges of the vertebrae, and also in the lumbar region.

Q. Did you take an X-ray of the lumbar spine? A. The lumbar
226 X-ray showed some narrowing between the fifth lumbar vertebra

and the first sacral vertebra with osteoarthritic changes and probably some slipping of the last lumbar vertebra, a little bit forward on the sacrum.

Q. Doctor, from the history which you received and your examination and findings, in your opinion, was it trauma that caused this condition?

MR. ROBERSON: Just a moment. May we approach the bench?

THE COURT: Yes.

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228 Q. Doctor, when Mr. Thrasher came to see you, how many times did you see him? A. Five times, I think, during a period of two weeks.

229 Q. And did you give or recommend any treatments? A. In view of his condition, I felt that a neurological examination was indicated and referred him to Dr. Hugo Rizzoli.

Q. Did you give him any treatments or recommend any treatments to him? A. Nothing except symptomatic treatment until certainly we arrived at a more conclusive diagnosis regarding his condition.

Q. Dr. Stevenson, I will ask you and I will separate the findings which you found: From the history which you were given by Mr. Thrasher, and your examination, in your opinion, Doctor, was the whiplash strain of the cervical and lumbar spine caused by the accident in which he was involved on April 14, 1952? A. In view of his history that he had been rather active and getting along fairly well, I would say that, in all honesty, in view of his history and the findings that we could certainly say that such an accident could cause and probably did cause the complaints and the injuries from which he suffered.

Q. That is the injuries to the back? A. The back and the neck.

* * * * *

231 Q. Doctor, I will start my question over again. Assume that in 1951, there was a small hernia discovered on Mr. Thrasher where the first marking on that picture was shown to you. Do you understand what I mean, the one at the top? A. Right.

Q. And that that hernia maintained its size, it did not grow, and that on April 14 of 1952, Mr. Thrasher was in an automobile which was struck in the rear, knocking him up against the steering wheel with force and that he suffered pains, according to his testimony, and soreness in the stomach area where that hernia was; that he did not report the next day to a physician that he had the trouble in the stomach but that subsequent thereto --

232 THE COURT: Although he saw a physician.

BY MR. CLARK:

Q. -- although he saw a physician but that subsequent thereto, in 2 or 3 weeks, this hernia began to enlarge and has enlarged more to the size that you saw when you examined him.

In your opinion, Doctor, would the trauma, the blow to the stomach, have caused that hernia to enlarge? A. I would say that it could, trauma --

THE COURT: That will be stricken. Doctor, you were asked for your opinion. Anything could happen.

THE WITNESS: I see. With the history and the findings, I would say yes to the question.

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234 CROSS EXAMINATION

BY MR. ROBERSON:

Q. Doctor, you are not a neurologist, nerve specialist, are you?

A. That is right.

Q. Do you specialize in any field? A. We do.

Q. Not what "we do" but what you do. A. I do a good deal of accident work, compensation work, and to do that you have to have some knowledge of neurology and so on, but I certainly would not wish to qualify myself as a neurologist or attempt to.

Q. A specialist in medicine means you restrict yourself to a particular field in medicine, is that right? A. That is right.

Q. You don't restrict yourself to any particular field? A. No.

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235 MR. ROBERSON: Will Your Honor indulge me just a moment?

MR. CLARK: One other question, Doctor. How much was the amount of your bill?

THE WITNESS: I don't even know.

MR. CLARK: Let me see if I can refresh your recollection. I show you this and ask you if this is your bill, this amount.

THE WITNESS: Yes.

MR. CLARK: How much is that?

THE WITNESS: \$125.

BY MR. ROBERSON:

Q. Doctor, you didn't see this man until more than three years after this alleged accident on April 14, 1952, did you? A. It was approximately that time. The accident occurred April 14, 1952 and I saw him about 2-1/2 years following his accident.

Q. You didn't see him until 1955, did you? A. October 25, 1955.

236 * * * * *

Q. Doctor, who would be in the best position to give an opinion on causation between various conditions resulting from an accident, persons that saw him within, say, six months from the time of the accident or a person who saw him not until 3-1/2 years after the accident? A. I think it is obvious that I would say within a year, a year and a half. If someone had been seeing this man, observing his condition, I think their judgment in it would be good.

Q. But you are at the disadvantage when you don't see him for 3-1/2 years after the accident, isn't that right? A. Some disadvantage. It is necessary to rely more or less on your history. The findings, the outcome of the thing, probably could have changed some.

Q. You felt that these alleged back complaints and neck complaints were matters that you preferred a neurologist to express an opinion on, didn't you? A. I felt that Mr. Thrasher's condition merited consultation. I felt that it was such that certainly we should have some consultation for him.

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Q. You are acquainted with Dr. Francis M. Forster, who is the

Dean of the Georgetown University Hospital Medical School? A. I have met Dr. Forster, yes.

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241 Q. Do you have a note there that Dr. Forster found -- A. I won't hesitate to say that I am sure that Dr. Forster must have done some neurological examination on him, but I don't have it here.

Q. Do you have a note there that he thought these complaints of Mr. Thrasher were on a psychogenic basis? A. He did suggest the possibility that Mr. Thrasher might be helped by psychiatric treatment, but I don't have any note here. Now, it could be.

Q. Psychogenic basis means originating in the mind, doesn't it, Doctor? A. Psychogenic does, yes, originating in the mind.

Q. And that is distinguished from having a bodily basis, is it not? A. Or organic or physical basis.

Q. Yes, and you ordinarily go to a psychiatrist for treatment in that sort of situation, isn't that true? A. If that is the entire basis for the trouble, yes. The two can co-exist.

Q. Are you acquainted with Dr. O'Doherty? A. No, I am not. I have met the man but I don't know him. Well, I know he is a neurologist.

242 Q. A nerve specialist? A. Yes.

Q. Are you aware of the fact that Mr. Thrasher received a neurological examination from Dr. O'Doherty, a nerve specialist?

A. Yes, I am aware of that.

Q. Are you aware of the fact that he thought that there was nothing, that the indicated situation with respect to Mr. Thrasher is that his complaints were due to osteoarthritis? A. That isn't the complete note I have here.

Q. What is your complete note? A. Severe pain of the cervical spine on a traumatic basis resulting in an aggravation of the cervical hypertrophic osteoarthritis, producing nerve root irritation, and also that he did have marked subjective complaints; some anxiety about his condition.

Q. According to your notes, wasn't Dr. O'Doherty's impression that these symptoms of Mr. Thrasher's were not on the basis of a neurological disease and that he would assume that arthritis was enough to account for his complaints? A. I will read the note as I have it here.

"Severe sprain of the cervical spine on a traumatic basis resulting in an aggravation of the cervical hypertrophic osteoarthritis."

* * * * *

244 Q. Doctor, with reference to this alleged hernia, wouldn't you expect a man that had been hit in the stomach to have immediate complaints of pain in that area? A. Oh, yes, certainly I would expect the man that got hit in the belly to have immediate complaints.

Q. If he received a blow in there severe enough to affect any hernia, you would expect him to be sore immediately, wouldn't you?

A. Unless his symptoms were masked. I mean, you see some strange things in this business. Ordinarily, you would expect it. You see, hernias pop loose sometimes without a great deal of pain or without any acute symptoms.

245 Q. Speaking in terms of probabilities, he would probably have immediate complaints of pain, wouldn't he? A. In a situation like this, he certainly would have some jarring of his abdomen and some pain.

Q. And he would complain of them, wouldn't he, ordinarily?

A. Ordinarily, he would complain unless some of his other symptoms masked the thing so he wouldn't notice.

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246 Q. I am asking you to assume the truth of this: That three months after the accident, he saw a doctor from time to time --

A. My feeling --

THE COURT: Let him finish his question.

BY MR. ROBERSON:

Q. -- from time to time and he made no complaints of pain in the abdominal area during that three months after the accident, wouldn't that lead you to believe that probably any enlargement of the hernia that appeared thereafter was not due to this accident but was due to

some intervening cause? A. It is difficult to say, it really is. You see some crazy things in this business.

247 Q. I am asking you about the probability, Doctor. A. The probability is that he certainly would have some complaints.

Q. And he certainly would complain to the doctor? A. It would seem reasonable to assume that he would, yes.

Q. And, Doctor, so far as the hypoesthesia around the face, you didn't find that followed the ordinary anatomical course of the nerves, did you? A. Not the nerves of the neck. I mean this area (indicating) but on that face business, I really would rather defer that to some neurological examination. I couldn't account for it unless there was some other involvement of the facial nerves or the sensory nerves of the face.

Q. Doctor, osteoarthritis can cause back pain, can't it? A. It can, yes.

Q. It frequently does? A. Occasionally.

Q. Occasionally, Doctor? A. Osteoarthritis itself, as we get older, we all get bony changes and those bony changes don't necessarily produce pain.

Q. They may or may not? A. May or may not.

Q. And if they do produce pain, they are sufficient to produce the
248 sort of pain that this man was complaining about, isn't that so?

A. Not the arthritis itself. There would have to be the nerve involvement.

Q. And you are not a neurologist, so you don't know the nerve involvement? A. Like I stated before, you would have to have a working knowledge of your basic neurology.

Q. You would prefer that we have a neurologist testify as to this?
A. That is exactly why I called in a neurologist.

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HUGO VICTOR RIZZOLI

was called as a witness by the plaintiffs and, being first duly sworn, was examined and testified as follows:

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251 Q. And have you specialized in any particular field? A. I have.

Q. And what? A. I am a neurological surgeon.

Q. How long have you been a neurological surgeon? A. I finished my training in 1944 and I have been a neurological surgeon since then.

Q. Did there come a time that you saw Mr. Howard W. Thrasher, Doctor? A. I did.

Q. When was that? A. The 13th of February, 1955.

Q. And he had been sent to you by someone else? A. He had been referred to me by Dr. Leland Stevenson.

Q. Did you at that time examine Mr. Thrasher? A. I did.

Q. Will you tell us, Doctor, the history that you received and the complaints and your findings? A. This man complained of burning sensations in the back of his neck, low back pain, pain down both legs and pain in the arms. He stated that he was a 55-year-old carpenter's

252 helper and that he had been involved in an accident in April of 1952. Apparently he was seated behind the steering wheel of a jeep station wagon which was at a standstill and, apparently, the back of his vehicle was struck by the front end of a trailer truck.

He stated that his car was thrown 7 or 8 feet ahead and was rammed into the rear of another vehicle. He indicated that he had been thrown forward against the steering wheel, after having been jerked backwards. He stated that he had the wind "knocked out of him."

The accident, he said, resulted in a nervous reaction and he went home to bed early that night. At about midnight, he awakened with pain high in his neck and there was pain to the right of his upper spine. He said this was a knifelike pain. It spread to the shoulders and to the middle of his back and then both arms. He stated that the pain was so severe that he had difficulty speaking; his neck was sore and stiff and it was also difficult for him to swallow.

Apparently the stiffness of the neck persisted and the soreness in the back of his head also persisted and was still going on at the time I saw him. He stated that this was especially true on motions of jarring his head and neck. He stated that there was soreness in this area in the back of the head where it is joined onto the neck.

253 He indicated that he continued to have low back pain, with pain radiating into both legs. He stated that at times he had sharp pulsating pain in the left knee and sometimes in the foot. At other times, he had pains in his arms.

He stated that all of the pains were aggravated by coughing, sneezing, walking and exertion. He stated that noises of sounds caused pulsating pains in his left knee and foot, at times in the right foot and at other times in the elbows and arms.

He also stated that he noted slight weakness and numbness in his left arm, together with weakness of grip in the left hand. He said that these symptoms were also present on the right side to a lesser degree.

He noted that his neck and shoulders were sore in the morning when he got out of bed. He stated that he had an abdominal hernia since the accident and he indicated that there had been no hernia present in this location prior to the accident. He had never had surgery in this area of his abdomen.

He also complained of difficulty with sexual relations.

He had X-rays taken by Dr. Terrafranca and these were reported as showing marked narrowing of the lumbosacral intervertebral interspace, with marked osteoarthritic changes in this region.

254 Q. Doctor, where is the lumbosacral intervertebral interspace located? A. That is the disc space between the fifth lumbar vertebra and the sacrum, which is just below the level of one's waistline.

Q. Proceed. A. X-rays of the cervical spine were said to show moderate hypertrophic lymphing of the anterior margins of the fifth and sixth cervical vertebrae and they were otherwise negative.

When I examined this man he appeared to be a well-developed man and did not appear to be acutely ill. His blood pressure was normal and his pulse was 96. His head was of normal shape.

There was soreness and tenderness in the suboccipital region bilaterally, more on the left than on the right.

Q. What do you mean by "suboccipital region bilaterally"?

A. Bilaterally is both sides. The suboccipital region is that part of the

back of the head just adjacent to the neck back of the ear.

Examination of the spine revealed there was no tenderness over the cervical spine itself but there was tenderness over the muscles adjacent to the cervical spine on both sides. There was no apparent spasm of these muscles in the cervical region. There was considerable limitation of motion on turning the head and neck in either direction.

255 Examination of the low back revealed that there was no tenderness but there was very slight spasm of the muscles on both sides of the lower lumbar spine. There was moderate limitation of motion on bending forward and backward. Straight leg raising test was slightly positive bilaterally.

Examination of his abdomen revealed that he had a large ventral hernia, at least 6 to 8 inches in diameter, which reduced very easily when the patient was lying down.

Examination of the cranial nerves revealed that there was no disturbance of the 12 cranial nerves excepting for some diminution of sensation to pinprick over the left side of the face as compared to the right.

Q. Is that what is called hypoesthesia? A. Hypoesthesia, diminished sensation.

Q. Could you account for what caused that, Doctor? A. Well, I felt that that loss of sensation was not on an organic basis.

Q. Very well. A. On motor examination, there was no evidence of motor paralysis, weakness, atrophy or unusual tremors.

Sensory examination of the rest of his body revealed that there was again a stocking like loss of sensation to pinprick, as compared with the right, on the left side in the lower extremities. And there was a questionable area of diminished sensation to pinprick in the left arm as compared to the right.

256 Q. Would you say that that had anything to do with the injury to the cervical vertebrae? A. Well, the distribution of the sensory loss in the lower leg, I felt, was also on an emotional basis and not related, directly related, to any organic cause.

The hypoesthesia in the left arm, to some degree, may have been

due to a cervical spine injury but when it follows no definite nerve route pattern, it may be overshadowed by an emotional area of hypoesthesia as he had in his leg and face, so we could not be sure of nerve root pattern in his arm but it is possible that some of the sensory loss in the arm was due to his neck injury.

The reflex examination was entirely normal. The patient's cerebral function was normal. He was alert, cooperative, well oriented, had no difficulty with speech and no difficulty recognizing objects in his hands when his eyes were closed.

The tests for the function of the cerebellum revealed that this function was normal.

It was my impression that the patient had sustained a strain of the cerebral and lumbar spine. In addition, he apparently had a ventral hernia which, according to his history, was a result of the accident.

I felt that the osteoarthritis present in this patient must be considered a factor in the persistence of his symptoms. I wondered about the possibility of another type of arthritis called rheumatoid arthritis

257 but I felt that this was unlikely.

I recommended to Dr. Stevenson at this time that more X-rays of the cervical spine and lumbar spine be taken since 2-1/2 years had elapsed since the last X-rays had been taken.

I also suggested that he be tried on muscle relaxants and physiotherapy in the form of hot packs and massage to both the low back and the cervical region, as well as neck stretching treatments on the neck.

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CROSS EXAMINATION

BY MR. ROBERSON:

Q. Doctor, it is a little unusual to see patients complaining of having pains in their feet when the doorbell rings, is it not? A. Yes, it is.

Q. And when an airplane goes overhead, pain in the knee and maybe pain in the foot? A. That is correct.

Q. And the sound of a saw causing pain in the elbow. That is unusual, too? A. That is right.

Q. Did you get any history that Mr. Thrasher made that sort of complaint? A. I think I stated in my history that sounds aggravated his pain.

258 Q. Do you think there is an organic basis for that? A. I would tend to feel that that is more emotional. I know of one condition which is very real and produces very severe pain, a condition known as causalgia, which is associated with peripheral nerve injury that we saw in the Army and these patients were first assumed to be purely emotional but that is a real thing, and that is, when we wanted to see how bad it was and whether the patient should have a sympathectomy for this condition would be to scrape our feet on the floor by the patient's bed and the more acute cases of causalgia, they would be much worse.

I do not feel that this man has causalgia. I feel that it is unusual for someone, with his type of pain, to complain of pain when he hears a noise but I am inclined to believe that this part of his complaint is emotional but when noise aggravates pain, it is not always due to an emotional reason.

Q. But in this case, you thought it was? A. I did.

Q. Doctor, you didn't see this man until 3 years and 8 months after the alleged accident, did you? A. I saw him for the first time in December, 1955.

Q. And the alleged accident was when? A. In April of '52.

Q. In other words, nearly 4 years, 3 years and 8 months, to be precise, after the accident? A. That is correct.

259 Q. Isn't it true, Doctor, that when a neurologist, assuming his competency, saw him, say, 6 months after the accident, you would have a more favorable opportunity to judge the relationship between the accident, if any, and these complaints than you did? A. Well, that may be true or it may not be true. I think, as far as persistence of symptoms, if one can assume that the story that the patient gives you is correct, I think sometimes vice versa may be true, but certainly I think that the man who sees him 6 months after the accident has an important contribution to the case.

Q. Did you know that several neurologists did see this man approximately 6 months after the accident? A. I know that several people saw this man. I don't recall exactly who.

Q. Do you know Dr. Francis Forster? A. Yes, I do.

Q. Who is he? A. He is a neurologist at Georgetown. He is Dean of the Medical School.

Q. Do you know Dr. O'Doherty? A. I do.

Q. Who is he? A. He is a neurologist at Georgetown.

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Q. Doctor, when you saw Mr. Thrasher on December 13, 1955, 3 years and 8 months after the accident, he came equipped with a 3-page alleged history of his symptoms, didn't he? A. I think so. I have a 3-page history of his symptoms.

Q. Dated December 13, 1955, and marked "Submitted," isn't it? A. I marked it submitted, indicating that the patient said we could have them.

Q. He gave it to you? A. Yes.

Q. And included in that history you don't find any reference to the fact that Dr. O'Doherty examined him with a neurological examination on August 18, 1952 and found it to be negative and found that he thought arthritis was enough to account for his symptoms. It is not in there, is it? A. I don't know. I haven't read this for 2 years.

261

Q. What you did read to us contains a large part of that, doesn't it? A. What I did read to you?

Q. Yes, sir. A. With the notes I summarized in talking to this man and reading this and dictated at the time I saw him, which is my report.

Q. Take your time and look at it and see if he gave you any history of Dr. O'Doherty's findings. A. I don't see any reference to any doctor.

* * * * *

262

Q. And a good many of these sensations that you did observe the man complaining of, in your professional opinion, had no organic basis,

isn't that right, sir? A. That is right.

Q. Some of them are psychogenic, in other words, originated in the mind? A. That is right.

263 Q. So far as his back pains are concerned, arthritis can cause back pains, can't it? A. That is correct.

Q. This man had some arthritis in his back, didn't he? A. That is true.

Q. Did you have any X-rays taken? A. No. I saw him in consultation with Dr. Leland Stevenson and suggested that more be taken at this time. Dr. Stevenson was treating him.

Q. Did you see any X-rays? A. No, I did not.

Q. You don't know how great or how little the amount of arthritis was, do you? A. I have a report from X-rays taken 2-1/2 years before I saw him.

Q. Of your personal knowledge, I mean, Doctor? A. No, I don't.

Q. In so far as the hernia is concerned, you are not a specialist in connection with hernias, are you? A. I am not.

Q. But you do know, Doctor, that if a man had a blow severe enough to cause a hernia, he would have some immediate pain or certainly within 3 months of the time of the alleged blows, he would have some pains and make some complaint of pain in the ordinary course, wouldn't he, Doctor? A. I think that since my specialty is neurological

264 surgery, I would rather not answer that question.

Q. I am afraid on direct examination you expressed an opinion about a hernia being caused by the accident --

MR. CLARK: He said according to the history.

BY MR. ROBERSON:

Q. If the history was that in 3 months no complaints were made in connection with the stomach, if you had that additional history, wouldn't you think probably that this hernia that you saw 3 years and 8 months after the accident was not caused by the accident? A. If the history is true that this man did not have a hernia before the accident, then it wouldn't make any difference to me whether or not he had pain

afterwards.

I would say that this hernia was due to the accident barring any intervening injury between the time that it was first picked up and the accident. I am saying "if the history is true."

* * * * *

265 Suppose the fact to be true that for 3 months, from April 14, 1952 through July of 1952, that a patient was seeing a doctor from time to time for other conditions which he claimed were due to the accident, wouldn't you think that, in the ordinary course, if he had received any hernia as a result of that accident he would make some complaints of pain in the stomach? A. I think I would rather not discuss it.

Q. You would rather not discuss it. That is all right, Doctor.

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MR. CLARK: Doctor, I forgot to ask you how much your bill was for this consultation. Do you have it with you?

THE WITNESS: Yes, I do; \$25.

* * * * *

271 FRANK CURTIS HUDGINS

was called as a witness by the plaintiffs and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * * * *

Q. You are an osteopathic physician? A. I am.

* * * * *

273 Q. Did you give him a physical examination? A. Yes, I did.

Q. Will you tell us what your findings were from your physical examination? A. I found him to have a condition in his neck which was similar, in my experience, to a whiplash neck just about here (indicating), mostly on the left side.

I asked him if he sneezed or coughed or strained hard, does the pain go down the arm, and he said it does. Upon touch I found it to be hard and very stiff. To move his neck was extremely painful when I first saw him.

274 In regard to the lower back, it was hard, his back, what I would call out of place or slipped or whatever you want to call it, and he had sciatica down the left leg. That was the most of his symptoms, most of my findings.

Q. Did he complain to you of any weakness in his extremities?

A. Yes, he did.

Q. What did he complain of? A. He complained of the fact that he couldn't walk very far or work hard before he would become extremely weak to the point where he asked his employer, his boss, to give him an easy job so he could work the whole day through.

Q. Did he complain to you of any difficulty with his arms, so far as weakness, or atrophy? A. Yes, both arms, but mostly on the left side.

Q. Did you find any objective findings of these conditions?

A. Objective -- well, as I say, his back was out. Now, I am just using that as a broad term. I don't know whether anybody knows what that means but it wasn't in the proper alignment. His lower back was not in the proper alignment. It is a common finding. We see it every day, 5 or 10 patients a day. Objective symptoms --

Q. And did Mr. Thrasher give you a history of having been involved in an automobile accident? A. Yes, he told me he was in an automobile accident.

275 Q. And from his history and your findings, do you think that your findings were as a result of the accident? Is that your opinion?

A. It is my opinion. However, I was not there when the accident occurred.

Q. But from his history -- A. Yes, from his history and from what he told me and my findings, the typical whiplash neck and the low back injuries.

Q. Did you take X-rays? A. I did.

* * * * *

276 Q. You say that that condition you found was between the fifth and sixth -- A. Between the fifth and sixth cervical vertebrae, some

narrowing of the disc.

Q. Let me ask you, Doctor, what, if any, of Mr. Thrasher's symptoms and conditions were attributable, in your opinion, to the injury of the neck? A. His symptoms to me were typical of a whiplash neck.

Q. What nerves do they affect and what parts of the body are thereby affected? A. Certain nerves called brachial plexus. That is in this
277 area (indicating) and supplies the arm and the shoulder.

Q. Does that go down to the fingers? A. It goes all the way down to the fingers, the hands and fingers.

Q. The nerves of the brachial plexus come down the arm to the fingers? A. Yes.

Q. Would that, in your opinion, be the cause of any hypoaesthesia in the area of the arm? A. Yes.

Q. Is that a condition that is likely to be chronic or something that might be cured? A. I don't think he ever will be cured. I think he is partially cured but I don't think he will ever be cured.

Q. You don't think Mr. Thrasher will ever be cured? A. No, I don't.

* * * * *

278 Q. The two principal nerves affected are the brachial plexus and the sciatic? A. The brachial plexus and the sciatic nerves.

Q. Sciatica, is that similar to neuralgia? A. Yes, ache and weakness.

Q. Is that something which will probably increase or decrease as time goes on? A. It will probably increase.

Q. Do you think that he will ever be cured of that? A. No, I don't think so.

* * * * *

279 Q. Is he still continuing the treatment with you? A. I have seen him either once a week now or once every other week.

Q. Since when? A. I have been seeing him -- well, at first I saw him once a week at least, sometimes twice a week and then we

finally got him down to once every other week and once in a while he can't go two weeks without a treatment and he has to have one every week.

Q. He seems to get relief at least for a short period of time?

A. Yes, he gets partial relief for a while.

* * * * *

280 Q. How about atrophy of the muscles? A. A small amount of atrophy but not too much.

Q. Where is the small amount located? A. I think it is in his leg.

Q. Which leg? A. Left leg.

Q. And you think his condition is permanent? A. Permanent.

Q. Are the pains that Mr. Thrasher suffers from, especially in the upper arms, similar to or what is called arthritis? A. Yes.

Q. And is that caused from the injury to the brachial plexus?

A. Yes.

Q. In the arm and shoulder? A. Yes, in here (indicating).

* * * * *

281 CROSS EXAMINATION

BY MR. ROBERSON:

Q. Dr. Hudgins, how long have you been an osteopath? A. About 20 years, since 1936.

Q. What were you before you became an osteopath? A. I was just a student.

* * * * *

282 Q. And what is a doctor called that specializes in nerve injuries?

A. I imagine that is a neurologist.

Q. You are not a neurologist, are you? A. I am not a neurologist.

Q. And a doctor that specializes in bone and joint injuries is an orthopedic doctor, is that right? A. A medical orthopedist, yes.

There is an osteoorthopedist, yes.

Q. You are not an orthopedist? A. I am not an orthopedist.

Q. You are not an orthopedist of either description? A. No.

Q. You didn't see this man until nearly 4 years after this alleged accident, is that right? A. Yes, that is right.

Q. Wouldn't a man who saw him shortly after the accident be in a better position to judge the causation than you were? A. Oh, yes.

Q. So far as these X-rays, the back not being in proper alignment, a perfect back is a mythical thing, isn't it, Doctor? A. Yes.

Q. You have never seen a perfect back, have you? A. Never.

* * * * *

283 Q. Did you examine the previous X-rays that had been taken of this man? A. I never saw them, no. To my knowledge, I never saw them.

Q. So if they showed arthritic changes, you were not aware of that, were you? A. I am aware that everybody has arthritis starting with the age of 30. It gradually develops.

Q. They can cause back pains, can't they, Doctor? A. Not the kind that I am talking about.

Q. How do back pains differ from arthritis? A. The type of arthritis that I am speaking of is an aging arthritis which is normal.

Q. Arthritis, whether it is by aging or trauma or any other kind, can cause pain in the back, can it not? A. Some arthritis is extremely painful. The aging arthritis is not painful at all.

Q. You mean, Doctor, that persons do not get arthritis from mere aging that becomes very painful? A. Well, there are some types
284 of arthritis that, when they age, they form very severe painful arthritis.

Q. Didn't you tell me a minute ago that aging arthritis does not cause pain? A. We are getting to talk about a big subject.

Q. We are just talking about aging arthritis right now. A. When I mentioned that the aging arthritis is a normal process, it does not hurt. It shows on films. The other types of arthritis can be extremely painful.

Q. So aging arthritis can become extremely painful, can't it?
A. Yes.

Q. But you found no arthritis in this man's back at all? A. Nothing other than normal.

Q. Didn't you testify that you didn't see any arthritis in his back at all? A. I didn't testify that he had any arthritis because I considered-- let me take this back -- between the fifth and sixth vertebrae, the narrowing is not normal. That is not normal.

Q. Didn't you find a congenital defect down in his lumbosacral area? A. Yes, but that is not arthritis.

Q. It is not caused by trauma either, is it? A. It is usually caused by two things. A man can be born with it or trauma.

285 Q. But congenital is not trauma, is it? A. No.

* * * * *

April 10, 1957. (Vol. 3)

305 How much is Dr. Hudgins' bill up to date?

PLAINTIFF THRASHER: \$250.

MR. ROBERSON: May it please the Court, I have a letter from Mr. Clark saying that Dr. Hudgins' bill is \$206. I will stipulate to that.

MR. CLARK: There have been some charges added to that but I will agree to \$206.

* * * * *

MR. ROBERSON: May it please the Court, I have under subpoena two of the plaintiffs' doctors. I have not had an opportunity to interview them. Would Your Honor recess for five minutes and let me have an opportunity to see them? They are waiting outside.

THE COURT: Very well.

(A short recess)

MR. ROBERSON: Call Dr. O'Doherty, please.

Thereupon --

DESMOND S. O'DOHERTY

306 was called as a witness by the defendants, and, having been first duly sworn, was examined and testified as follows:

* * * * *

Q. Doctor, do you specialize in any particular field of medicine?

A. Yes, medical neurology.

Q. What specialty is that? What does that deal with? A. That is a medical specialty that deals with diseases of the brain, spinal cord, and the nerves.

Q. What training did you have to practice this specialty? A. I have an M. D. degree from medical school, Jefferson Medical College, in Philadelphia.

I had three years of specialized training in neurology following my internship and one year of a research fellowship in neurology.

307 I also practiced neurology and psychiatry two years in my Army service.

Q. How long have you been located in the District of Columbia, sir? A. Approximately 7 years.

Q. Did there come a time when you were called upon to make a neurological examination of Mr. Howard Thrasher, who sits here (indicating)? A. Yes.

Q. Approximately when did you make that examination? A. Early in August of 1952.

* * * * *

Q. What was the purpose of your examination? A. To see whether there was any damage to the spinal cord or to the nerves that were causing Mr. Thrasher's pain and stiffness.

* * * * *

309 Q. What did you do in connection with your examination of Mr. Thrasher? A. I did a routine neurological examination which consisted of going over the nerves of the eyes, the face, the tongue, the palate, the muscle strength, reflexes, and what we call sensory changes, that is, to see if there is any loss of sensation over areas of the body, and also to test coordination.

Q. What was the result of your neurological examination? A. The neurological examination was completely normal.

* * * * *

Q. Did you reach any conclusion as to whether this man, Mr. Thrasher, had any neurological trouble as a result of the alleged accident of April 1952? A. There was none evident.

Q. Did you reach an opinion as to the probable cause of what pains he did say he had? A. I thought that these could be on the basis of arthritis. There was no -- this is a little bit out of my competence, and this was only a presumption on my part, not definite.

310 Q. But you did know, as a doctor, that arthritis caused pain in the back? A. That is right.

Q. Doctor, just generally, is it easier to decide on the casual relationship when you examine a patient within a few months after an alleged accident than if you examine him some years later? A. Invariably it is easier when you examine him close to the time of the accident.

* * * * *

313 MR. ROBERSON: Dr. Francis Forster, please.
Thereupon --

FRANCIS MICHAEL FORSTER

was called as a witness by the defendants and, being first duly sworn, was examined and testified as follows:

* * * * *

314 Q. What is your occupation, sir? A. Physician.

Q. What medical training have you had? A. I am an alumnus of the University of Cincinnati, College of Medicine, in the class of 1936.

Q. How much college did you have before you went to the Cincinnati College of Medicine? A. I had 2 years of pre-medic at Xavier University.

Q. When did you finish in a medical school? A. 1936.

Q. And you finished medical school -- When did you finish? I asked you when you entered. A. I entered in 1932, in the fall of '32, and finished medical school in June of '36.

Q. And then what post-graduate training, if any, did you have in medicine? A. I interned at the Good Samaritan Hospital in Cincinnati,

Ohio, and had a year as a house officer in neurology and neurosurgery at Harvard Service at the Boston City Hospital in 1937 and '38 --

Q. Excuse me, Doctor, by then had you decided to specialize in some field of medicine? A. Yes.

315 Q. In what? A. In neurology.

Q. That is what branch of medicine? A. This is the branch of medicine that deals with the diseases of the nervous system rather than those of the mind. It deals with diseases such as epilepsy, brain tumors, neuritis, accidents, and so on.

Q. And was your subsequent post-graduate training in connection with your speciality? A. Yes.

Q. Will you go on and detail those to the jury, please? A. After this year in Boston City, I had a year of psychiatry at the Pennsylvania Hospital in Philadelphia and then returned to the Boston City as assistant in neurology at Harvard for a year and following this, had a year under a Rockefeller Research fellowship at Yale University in physiology.

Q. While at Jefferson Medical College in Philadelphia, were you associated with Dr. Bernard J. Alpers? A. Yes.

Q. He is one of the leading neurologists of the country? A. Yes.

Q. Did you collaborate with Dr. Alpers in his leading text in the field of clinical neurology? A. Yes, that is acknowledged in the preface.

* * * * *

Q. Dr. Forster, how long have you been in the District of Columbia? A. Since July 15 or 17, 1950.

* * * * *

317 Q. What is your position, your present position, in connection with the Georgetown University Medical School? A. I am still the chairman and head of the Department of Neurology and Professor of Neurology, and I am also Dean of the Medical School.

Q. Dr. Forster, in your capacity as a specialist in neurology, did you have occasion from time to time to have patients referred to you for your opinion? A. Yes, sir.

* * * * *

Q. Did you have occasion in that connection to examine a man named Mr. Howard Thrasher? A. I did.

Q. Who referred Mr. Thrasher to you? A. Dr. Wein, Dr. Arthur Wein.

* * * * *

Q. When did Dr. Wein refer Mr. Thrasher to you, at least when did you make your examination? A. I examined Mr. Thrasher on October 21, 1952.

318 Q. What was the purpose of your examination? A. Dr. Wein wished my opinion on Mr. Thrasher's condition --

Q. Opinion as to what? A. Well, as to his medical problems.

* * * * *

319 Q. In addition to taking a history, what type of examination did you make of Mr. Thrasher? A. I conducted a neurological examination of Mr. Thrasher.

* * * * *

321 Q. Did you reach a conclusion, Doctor, based on the history and your examination as to whether this man had any illness which was based on organic troubles or muscle troubles connected with the functioning of the body itself as distinguished from the mind? A. I concluded that I did not believe that Mr. Thrasher had an organic neurological illness. I felt he was very tense and anxious and very concerned and he constantly recounted his symptoms almost in a stereotype fashion and he twice mentioned to me that he was not imagining these and they were not coming from his mind.

My own conclusion was and I was reasonably certain that these were in fact on a psychogenic basis and suggested in my note to Dr. Wein that Mr. Thrasher have psychiatric treatment.

* * * * *

322 Q. One final thing, Doctor: In connection with trying to establish causation, if any, between an accident and a set of complaints, the doctor who examines him within a reasonable time of the actual accident
323 is in a more favorable position to reach an accurate opinion as to

the casual connection than a doctor who had examined him some years later? A. I believe so, sir.

* * * *

331 JOHN E. CUNNINGHAM

called in a witness in his own behalf, being first duly sworn, was

332 examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROBERSON:

* * * *

Q. Mr. Cunningham, were you driving a vehicle that was involved in an accident on April 14, 1952? A. Yes, sir.

* * * *

334 Q. How much damage did you do to your vehicle? A. Not any.

Q. Did your bumper meet the jeep bumper? A. Yes, the bumpers hit. It didn't do any damage to mine at all.

* * * *

Q. Mr. Cunningham, who claimed to be hurt in this jeep? A. Well, the lady first said she was the one that was hurt and the officer asked her to go to the hospital, and she said she wasn't hurt bad enough to go to the hospital, she would go to a private doctor.

335 * * * *

Q. Did the man driver of the jeep go anywhere? A. Oh, yes, he went and called the officers.

Q. What means of transportation did he have? A. He walked. He walked.

Q. How far did he walk? A. Well, the closest telephone booth, the closest place to call was West Virginia Avenue.

Q. About how far is that in blocks? A. Two blocks.

* * * *

336 Q. Did you see him when he came back? A. Yes, sir.

Q. Was he walking or was he riding? A. Walking.

Q. Was it uphill or downhill walking back? A. Uphill coming back.

Q. Did he show any signs of being injured? A. No, sir, he didn't say anything about he was injured at all.

Q. Did he claim to be injured? A. No, sir.

* * * * *

348 MR. ROBERSON: * * *

* * * * *

349 May this be marked Defendants' Exhibit 3 for identification?

(Letter dated April 3, 1957, giving list of witnesses the plaintiff expected to call was marked Defendants' Exhibit 3 for identification.)

MR. CLARK: May we approach the bench?

THE COURT: Yes.

(At the bench:)

MR. CLARK: I don't know what relevancy that has with this case. I mean that is a requirement of the pre-trial order and I never got a list from them, not a single witness that they were going to call.

THE COURT: I suppose he wants it as the basis for an instruction that if any party has failed to call a witness who would have given material testimony and given no explanation for failing to call him, then the jury could infer that the witness, if called, would give unfavorable testimony.

MR. CLARK: That is not the law. They are equally available to him as to me.

THE COURT: I assume that is what he had in mind. Of course, they have to be peculiarly available to him. Maybe I made a mistake.

MR. ROBERSON: On April 3, 1957, received by me on April 4, 1957, was a list of the witnesses that Mr. Clark expected to call.

350 Listed there were Doctors John P. Gallagher and Arthur P. Wein, neither of whom has he called nor explained why he hasn't called them. Not listed were Dr. Robert Hottel and Dr. Terrafranca who Mr. Clark has stated he did not list in inadvertence. That is in pencil. Also listed are two doctors whom I did subpoena, Dr. Forster and Dr. O'Doherty, who testified this morning.

The purpose of this is to show that as late as the receipt of this letter I had no information he was not going to call Dr. Gallagher and Dr. Wein and, therefore, they being physicians of his and peculiarly available for him and failing to give a reason for not calling them. I said in my opening statement these were the doctors he was going to call and he did not tell me then, but I think I am entitled to that instruction that they were peculiarly available to him.

* * * * *

351 THE COURT: I overrule your objection but I will give you permission to take other steps if you wish to take other steps, in connection with these witnesses.

You say you are going to call Dr. Wein anyway?

MR. CLARK: I ask your permission to do that, yes.

THE COURT: Then you can call Dr. Gallagher and tender him, if you want to, which will, of course, then do away with any instruction. I have to take the case as I find it.

* * * * *

352 MR. ROBERSON: All right, sir.

(Defendants' Exhibit 3, previously marked for identification, was received in evidence.)

MR. ROBERSON: On the letterhead of Douglas H. Clark dated April 3, 1957, and stamped "Received April 4, 1957":

"Hogan and Hartson,
810 Colorado Building
Washington, D. C.

"In re Thrasher v. Giant Food Shopping Center, et al.

"The following are the witnesses, in addition to the plaintiffs, who are expected to be called at the trial of the above-entitled case:

353 "Leland Stevenson, M. D., 2101 R Street, N. W.

F. Curtis Hudgins, 2527 Wilson Boulevard, Arlington, Va.

Granville Curley, 1368 Quincy Street, N. W., Washington, DC

Hugo V. Rizzoli, M. D., 1150 Connecticut Ave., N. W.,
Washington, D. C.

John P. Gallagher, M. D., 1150 Connecticut Ave., N. W.
Washington, D. C.

Arthur B. Wein, M. D., 1801 Eye Street, N. W.,
Washington, D. C.

Police Officer Kenneth McPherson and Police Officer
Sims, Metropolitan Police Department, Washington, D. C.

"I would appreciate receiving a list of the witnesses you expect to call.

Very truly yours,

(Signed) Douglas A. Clark."

* * * * *

363 THE COURT: * * *

* * * * *

I wrote up something myself, in draft form, on this and maybe you both could agree to it.

I thought this was fair. Would you like to listen to what I have written on damages?

364 MR. ROBERSON: Yes, Your Honor.

THE COURT: (reading)

"If you find for the plaintiffs, then you will come to the question of damages and on this question award to each of the plaintiffs a sum which will fairly and reasonably compensate them for the damages they have sustained, proximately resulting from the collision, taking into consideration the pain and suffering sustained and that is likely to be sustained in the future; any physical impairment sustained and reasonably likely to be sustained in the future, the reasonable value of necessary medical expenses incurred and reasonably likely to be incurred in the future and one-half of the damage to the jeep, inasmuch as it was owned jointly by the plaintiffs. Any pain and suffering or physical impairment not proximately caused by or attributable to the collision are not elements of the damage to be included in your award because defendants are not responsible for them."

MR. CLARK: I will adopt that, if the Court please.

MR. ROBERSON: No objection to that, Your Honor.

THE COURT: It seems to me that is fair.

MR. CLARK: That is fair, yes, sir.

* * * * *

365 THE COURT: Let's take up Defendants' No. 1.

Any objection to No. 1?

MR. CLARK: No objection.

366 THE COURT: Very well.

Now, I will take up No. 2. Any objection to No. 2?

MR. CLARK: No objection, and no objection to No. 3. I object to No. 4.

THE COURT: Even if you have Dr. Wein here, there is still left Dr. Gallagher.

MR. CLARK: Yes, and he is in New York.

THE COURT: You have not tendered him.

* * * * *

369 THE COURT: That would make a physician peculiarly available to the patient, and the patient, if he saw fit, could refuse to permit the physician to testify.

MR. CLARK: Could I have refused?

THE COURT: I think you could. It would not look nice before the jury.

MR. CLARK: He could have had Dr. Gallagher testify exactly
370 the same as he did those other physicians. The subpoena is available to him as it is to me and he cannot deny that.

* * * * *

MR. ROBERSON: Your Honor, I don't understand how, if he subpoenaed the witness, he let him get away to New York because he has known, since Monday, this case was on for trial.

Moreover, I think irrespective of whether he subpoenaed him or not, he is peculiarly available to him because a doctor has a statutory privilege until they waive it. I wouldn't have any way of knowing until

he is produced on the stand whether he waived it or not. I took the chance because Dr. Forster and Dr. O'Doherty were not listed in this letter to me of the physicians he was going to call. I took a chance of
 371 subpenaing them here in the hope he would not claim the privilege. He did not but I had assumed that he was going to produce these men for he wrote a letter saying he was going to produce them. I think they were peculiarly available to him.

* * * * *

MR. ROBERSON: I don't think he has made an adequate showing of the circumstances under which he has gotten away from town. He may have been gone when this was served. He may have had some communication, "Go on to New York, I will call you if I need you." There is complete absence of that and, apart from that, he has the
 372 statutory privilege. There is a Dr. Gottlieb who saw this man soon after this accident.

MR. CLARK: I haven't subpenaed him.

MR. ROBERSON: He was peculiarly available to the plaintiffs and I think the inference would apply to him.

THE COURT: I believe on the facts I should grant this instruction but, of course, you may change the posture of the case tomorrow morning by offering such evidence as you see fit to offer. It may be that Dr. Gallagher will be back.

MR. CLARK: I don't think he will be back tomorrow.

THE COURT: Just as you wish. I will grant it now but the case will have to go over until tomorrow anyway, apparently.

MR. CLARK: I want to say this to Your Honor: I will ask Your Honor not to preclude a little further discussion of this matter because I am positive that the law is that if they are available, available meaning to subpena by both persons in a personal injury action, I don't think Your Honor would have listened to me a moment this morning if I had said I stand on my privilege with Dr. Forster and Dr. O'Doherty --

THE COURT: Indeed I don't think I would, --

MR. CLARK: I don't think you would. He waived that privilege.

THE COURT: When?

MR. CLARK: When he files this lawsuit. He waives this privilege.

373 THE COURT: Why all this rule? I see your point. I will withhold ruling on this and let you argue it later on, both sides, whether or not this witness is as peculiarly available to you as the other side notwithstanding the privilege. You think it is waived when he brings the lawsuit?

MR. CLARK: I think it is waived when he brings the lawsuit.

THE COURT: Of course, we never encounter that proposition because nobody ever raises the question before the jury.

* * * * *

April 11, 1957. (Vol. No. 4)

379 ARTHUR BENJAMIN WEIN

was called as a witness by the plaintiffs and, being first duly sworn, was examined and testified as follows:

* * * * *

390 Q. Doctor, did you yourself observe the hernia? A. Yes, sir.

Q. Did you form a professional opinion as to whether or not that was caused by the accident? A. Yes, sir.

391 MR. CLARK: I object to the question. No foundation has been laid at all as to the factual issues.

THE COURT: Overruled.

BY MR. ROBERSON:

Q. What is your opinion, Doctor? A. That the herniation pre-existed the injury and was not related to the accident.

* * * * *

392 Q. Doctor, would you refer to paragraph 4 of your report, and I ask you about the cervical spine. That is the neck spine, isn't it?
A. Yes, sir.

Q. Would you examine your report and see what it says about whether or not there was any pain? A. Yes, sir. (Reading) "All cervical spine motions are normal and produce no pain."

Q. That refreshes your recollection that he could move his neck without pain? A. Yes, sir.

Q. Doctor, was there any evidence of a wasting away of the muscles in his upper arm? A. There was no evidence of atrophy of the shoulder musculature.

* * * * *

393 Q. On your examination as an orthopedist of Mr. Thrasher, did you observe any abnormal reflexes? A. No, they were all considered normal.

* * * * *

Q. In the case of Mr. Thrasher, did you find most of his complaints subjective and which you could not corroborate by objective proof? A. Yes, sir, exactly that.

394 Q. Passing on to Mrs. Thrasher, you examined her also, did you not, sir?

* * * * *

Q. What were her complaints, if any? A. Upper back pain.

Q. Did you form any opinion as to whether this upper back pain she had was related to this automobile accident of April 14? A. Yes.

Q. April 14, 1952. A. Yes, I did.

Q. What was your opinion, Doctor? A. My opinion was that her upper back pain was related to the type of work which she was doing and not directly related to her accident.

Q. And what instructions did you give her as a result of that opinion, Doctor? A. Postural exercises and to try to position herself at work so that she would put the least amount of strain on her upper back.

* * * * *

397 BY MR. CLARK:

Q. Did you see X-rays that were taken of this patient, of the cervical spine? A. I did, yes.

Q. Did you read those X-rays? A. No, I accept the report of the roentgenologist since I do not specialize in roentgenology.

Q. So you don't know yourself what the X-rays showed, do you?

A. Only what the radiologist told me they showed. I believed that.

Q. You believed that, but you don't know what he said is so, do you? A. No, since I am not a qualified radiologist.

Q. In all of your examination of Mr. Thrasher which you refer to in your letter of May 8, 1953 directed to Mr. Davis, will you tell us
398 what your diagnosis was? A. My diagnosis, based on reports of the roentgenologist and my history and physical examination, revealed that he had a sprain of the cervical spine.

Q. Read the first word, Doctor. A. (Reading) A severe sprain of the cervical spine on atraumatic basis resulting in an aggravation of the cervical hypertrophic osteoarthritis and producing irritation with marked subjective complaint.

Q. What further comment did you make about him? A. My comment was that prognosis was good and a minimal amount of permanent disability should be expected. In my opinion, it would be estimated at 10 percent.

* * * * *

REDIRECT EXAMINATION

BY MR. ROBERSON:

Q. Doctor, of course you don't know what trauma could have caused this sprain, do you? A. No.

* * * * *

399 THE COURT: When he offered that letter from you, he laid the foundation for the prayer that he requested and the prayer contem-
400 plates that a party must call a witness peculiarly available to him and, without a reasonable ground, fails to call him an inference arises.

* * * * *

401 MR. ROBERSON: Your Honor, I think I am still entitled to the prayer. Dr. Wein was produced here and examined by the plaintiff only on the matter of clearing up a medical report of some other doctor.

It seems to me I am entitled to the inference that he was peculiarly available to him and did not call him.

THE COURT: I think you waived all that when you made him your witness.

MR. ROBERSON: I think Dr. Gottlieb, who treated this man, has not been produced. I am entitled to the prayer on that ground.

THE COURT: Dr. Gottlieb treated him for what?

MR. ROBERSON: He saw him about this foot and that is one of
402 the complaints he has been complaining about in this action and so I think --

THE COURT: That will be about all you could argue, then, if I granted the prayer.

* * * * *

MR. ROBERSON: We are forcing him to produce him now and I can argue they didn't voluntarily do it, so I think my prayer is proper.

MR. CLARK: If the Court please, I don't think that any of these witnesses are peculiarly under my control and direction. I don't think that I have any privilege since the plaintiff has testified and has testified about visits to these various doctors.

The Court of Appeals said first in a criminal case, Taylor v. U. S., 95377, and reaffirmed that in the case of Brown v. Brook, et al., a will case, in which the Court said that the doctor-patient privilege in this jurisdiction extends only to information the physician acquires in attending a patient in a professional capacity. This doesn't include
403 information obtained by examination and they cite Taylor v. U.S. I will pass this up to you.

THE COURT: I understand, and you contend that when a physician is called in for consultation to make a diagnosis and evaluation of a patient's trouble, physical trouble, and the patient discloses confidential communications to him, because he doesn't prescribe a bill, that that confidential relationship does not exist?

MR. CLARK: It is only examination, yes, Your Honor, and Judge Youngdahl agreed. Judge Youngdahl said in Chambers v. Tobin in 118 Fed. Supp. at 555 that the plaintiff waived the physician-patient privilege as to her doctor testifying against her by her own testimony as to conversations with these doctors.

THE COURT: After she testified as to conversations?

MR. CLARK: Well, my man has testified that he went to Dr. Gallagher and that Dr. Gallagher examined him. That is all that that means. It is at the top of the left-hand page in the second column, I believe.

THE COURT: Of course, if you have Dr. Gallagher here to testify, unless Mr. Roberson is right in his contention, all this is academic as far as this case is concerned.

MR. CLARK: That is right and I expect him here at 12:00 o'clock, but I will be willing to go right ahead except for that one thing right now and argue to the jury. He can argue about Dr. Gottlieb if he wants to.

404 That is perfectly all right with me. I don't think he is entitled to the prayer and I object to the prayer being given, but a man is convinced against his will, he may be of the same opinion.

* * * * *

JOHN P. GALLAGHER

was called as a witness by the plaintiffs and, being first duly sworn, was examined and testified as follows:

* * * * *

405 CROSS EXAMINATION

BY MR. ROBERSON:

* * * * *

409 Q. Will you tell us what your summary conclusion was? A. It was stated then and I will try and edit this to make it understandable, I stated that this patient apparently sustained a snapping injury to the spine in his neck as a result of being involved in an auto accident on the 14th of April, 1952.

A review, in answer to the other question, of the X-rays brought along by this patient revealed the fact that there was a narrowing of the bones, specifically the fifth and sixth vertebrae, with possible pressure on the corresponding spinal nerve root emerging at that level.

I stated further that although it was difficult to totally add up this patient's complaints, there was at least a fair possibility that he did have a nerve root compression.

MR. ROBERSON: I do not believe we are interested in possibilities.

410

BY MR. CLARK:

Q. Is it your opinion that he had --

MR. ROBERSON: I object to leading the witness.

MR. CLARK: He is your witness.

MR. ROBERSON: He is your witness.

THE COURT: The objection is overruled. You may cross examine.

BY MR. CLARK:

Q. It was your opinion at that time he had a nerve root compression? A. I stated --

THE COURT: No, do not state what you stated.

BY MR. CLARK:

Q. All you can state is your opinion. From the history and the findings that you made, was it your opinion that there was a nerve root compression at the lesion of C-5 and C-6 level? A. Yes.

Q. You stated that was the result of what? A. An alleged accident sustained on April 14, 1952.

* * * * *

411

RECROSS EXAMINATION

BY MR. ROBERSON:

Q. Doctor, did you think it was difficult to get a precise history from this man? A. I thought it was difficult for me to clearly understand some of his answers to me.

Q. And so far as there being a possibility of a disc injury, that is the very reason you wanted the myelogram, isn't it, to see whether or not that was so? A. I suggested that a myelogram be done to rule in or out a disc condition.

Q. You would have felt more confidence in your diagnosis if he had had such a myelogram performed, wouldn't you? A. Yes.

* * * * *

Q. In the history that he gave you, did he tell you that within 4 to 6 months after the accident, he had had neurological examinations by Dr. Desmond O'Doherty and by Dr. Francis Forster? A. I don't recall his telling me that he was examined by Doctors O'Doherty and Forster.

Q. You are acquainted with those gentlemen? A. Very intimately.

Q. Do you consider them competent? A. Completely so.

* * * * *

Q. You don't think that it is more beneficial to see him 4 to 6 months after an accident than a year afterward? A. Obviously not.

Q. You think you can form an opinion as to the casual relationship when you see him later? A. That is correct.

Q. In other words, if you saw him 15 years later, it is a whole lot better than seeing him the first year, is that right? A. I wouldn't say that either.

* * * * *

414 MR. CLARK: The symptoms you determined in this patient were not caused by age, were they?

THE WITNESS: I don't believe so.

* * * * *

THE COURT: All that is left, isn't it, is this requested instruction No. 4 of the defendant? Isn't that all that is left to be decided on prayers?

MR. CLARK: I think that is correct.

THE COURT: Is that your recollection, too?

MR. ROBERSON: Yes.

THE COURT: Do you still stand on that, Mr. Roberson?

MR. ROBERSON: Yes, sir.

THE COURT: On the basis of Dr. Gottlieb?

415 MR. ROBERSON: Yes, sir.

THE COURT: Do you wish to oppose it on that basis?

MR. CLARK: I oppose it for the reasons which I previously stated

to Your Honor and unless Your Honor wants me to repeat them I see no necessity of repeating them.

THE COURT: I will grant the prayer.

MR. CLARK: Of course, may I point out, that in this letter I don't think Dr. Gottlieb's name is mentioned as a witness I intended to call.

THE COURT: Even so, as I see it, this witness was peculiarly available to you even though you did not mention him in the letter.

MR. ROBERSON: As I understand Your Honor's earlier remarks, you feel that under the status of the evidence I am not entitled to argue that particular instruction with respect to any witness except Dr. Gottlieb, is that right?

THE COURT: Yes, because the instruction is that if you should find that any party has failed, without reasonable excuse, to call as a witness any person in a position to know material facts about the issues here being tried and who is peculiarly available to that party, then you may infer the testimony of such witness, if called, would have been unfavorable to the party who failed to produce him.

That would be inapplicable to Dr. Gallagher and Dr. Wein, who have been called.

416 MR. ROBERSON: Yes. I don't want to go outside the intent of Your Honor's ruling. I intended to argue that I, so to speak, had to go into the enemy's camp to get Dr. Wein and Dr. Forster, Dr. Gallagher and Dr. O'Doherty, and that I am entitled to argue they should have produced him and Your Honor does not intend to preclude me?

THE COURT: No.

* * * * *

418 CHARGE TO THE JURY

THE COURT: Members of the jury, it now becomes my duty to charge the jury, which means to give the jury the principles of law applicable to this case. The jury is required to follow the law as I give it to you.

* * * * *

428 I shall now read another instruction. Should you find that any party has failed, without reasonable excuse, to call as a witness any person in a position to know material facts about the issues here being tried and who is peculiarly available to that party, then you may infer that the testimony of such witness would, if called, have been unfavorable to the claims of the party who failed to produce him.

* * * * *

The disputed questions before you, generally stated, are two: one, whether the defendants are liable for any injuries sustained by the plaintiffs, or either of them, and, second, if you find liability, the extent and duration of such injuries as they sustained.

* * * * *

430 As to damages, if you reach that point, Mr. Thrasher claims that he was thrown forward against the steering wheel and thereafter thrown backward, proximately resulting in many injuries, including injuries to his cervical spine and to the lumbosacral area, an aggra-
431 vation of arthritic changes in the spine which he claims have persisted and will continue to persist for the rest of his life; an aggravation and enlargement of a pre-existing abdominal hernia.

Mrs. Thrasher claims that she suffered severe injury to her neck and back and has suffered severe pain for a long period of time and still suffers, to a lesser degree.

On the other hand, defendants claim that Mr. and Mrs. Thrasher actually suffered no injury of any consequence as a result of the accident. In so far as Mr. Thrasher is concerned, defendants claim the symptoms of pain which he claims he suffered or is still suffering from, are unrelated to the occurrence and are mental or pretended in order to recover moneys from the defendants to which he is not entitled. More particularly, defendants claim that the pains of which he complains, if they do exist, result from an old arthritic condition in his back and that the hernia existed before the collision and has become enlarged by causes unrelated to the accident.

So far as Mrs. Thrasher is concerned, defendants claim that if she did suffer any injuries, they were superficial and she recovered shortly thereafter. Those are the issues in this case in respect to damages.

There has been medical testimony of considerable volume on these points, much of it conflicting, and it will be necessary for you to weigh and evaluate that testimony and the testimony of the parties and
432 determine again where the truth lies.

* * * * *

If you find for the plaintiffs, then you will come to the question of damages and on this question you will award to each of the plaintiffs a sum which will fairly and reasonably compensate them for the injuries sustained proximately resulting from the collision, taking into consideration the pain and suffering sustained and that likely to be sustained in the future, any physical impairment sustained and reasonably likely to
433 be sustained in the future, the reasonable value of the medical expenses incurred and reasonably likely to be incurred in the future, and one-half of the damage to the jeep in respect to each plaintiff inasmuch as it was owned jointly by the plaintiffs. Any pain or suffering or physical impairment not proximately caused by or attributable to the collision are not elements of the damage to be included in your award, because the defendants are not responsible for them.

On all these points, as I have stated, the evidence is in conflict and irreconcilable in many respects.

* * * * *

434 Any objections, gentlemen?

MR. ROBERSON: May we approach the bench, Your Honor?

THE COURT: Yes.

(At the bench:)

MR. ROBERSON: Your Honor, I thought it was an excellent charge and there is only one thing that I would suggest. I listened to
435 your charge on the burden of proof and Your Honor told them what would be the effect --

THE COURT: I did.

MR. ROBERSON: I didn't catch it.

MR. CLARK: I want to reserve my objection to that one prayer.

THE COURT: All the objections as to the instructions submitted which have been denied are renewed and the objections have been made and the Court ruled as before.

* * * * *

THE COURT: The jury will retire to the jury room to consider of its verdict.

(Thereupon, at 4:00 o'clock p.m., the jury retired to the jury room to consider of its verdict.)

(The Court was recessed until the return of the jury.)

(Thereupon, at 5:05 o'clock p.m., the jury returned to the courtroom.)

* * * * *

436 THE DEPUTY CLERK: Mr. Foreman, has the jury agreed upon its verdict?

THE FOREMAN: Yes, ma'am.

THE DEPUTY CLERK: In the complaint of the plaintiffs Howard W. Thrasher and Doris May Thrasher against the defendants Giant Food Shopping Center, Inc., and John E. Cunningham, how do you find, for the plaintiffs Howard W. Thrasher and Doris May Thrasher, or for the defendants Giant Food Shopping Center, Inc., and John E. Cunningham.

THE FOREMAN: We find in favor of the plaintiffs.

THE DEPUTY CLERK: In what amount do you find for the plaintiff Howard W. Thrasher?

THE FOREMAN: \$250.

THE COURT: How much?

THE FOREMAN: \$250.

THE DEPUTY CLERK: In what amount do you find for the plaintiff Doris May Thrasher?

THE FOREMAN: \$250.

THE DEPUTY CLERK: Members of the jury, your foreman says in the complaint of Howard W. Thrasher against both defendants you find for Howard W. Thrasher in the sum of \$250, and in the complaint of Doris May Thrasher against both defendants, you find for the plaintiff Doris May Thrasher in the sum of \$250, and this is your verdict, so

437 say you each and all?

(The jurors nodded assent.)

EXCERPTS FROM ARGUMENT ON BEHALF OF THE PLAINTIFFS

* * * * *

Tr. A-7 Has there been one bit of testimony brought in by the defendant that this hernia that this man has was not caused by this accident? Has there been one bit of testimony that it was not caused by it? I don't mean caused. I mean aggravated because he admitted that he had a small hernia.

* * * * *

There has been a lot of conversation about this not being caused by the accident but there again you must decide from the witnesses, and only two people testified on this stand who were qualified to say whether or not, in their opinion, this was caused by this accident, and that was Dr. Stevenson and Dr. Hottel, and obviously Dr. Hottel did not make an examination of the man's stomach because he said he didn't have a hernia until I finally got him back into his records and he did look up where he had noticed a small hernia in the upper part of this man's stomach a year ago or sometime before.

* * * * *

Tr. A-8 Dr. Hottel made light of this case, and why? It was perfectly obvious that his 37 years as a private practitioner are just a little too many. He has reached the state now that he doesn't properly diagnose and treat but I presented him to you for what he knew about these injuries because he is the first man who saw these people.

* * * * *

TR. A-22 ARGUMENT ON BEHALF OF THE DEFENDANTS

MR ROBERSON: Ladies and gentlemen of the jury, I told you at the outset of this case we expect the evidence to show that the Giant Food Company and John Cunningham were not liable for this accident and that even if they were liable, that the real injuries sustained in the accident, if any, were comparatively minor in nature.

* * * * *

Tr. A-28 Moreover, if he had had this stomach injury as Dr. Hottel, an experienced general practitioner with 37 years behind him and who sees many hernias every year, said if he had had a severe enough stomach impact to have caused or to have aggravated a hernia, there would have

been nausea, complaint of pain at the time, and yet he took his wife to the doctor and did not even go in and have the doctor look at him. Does that sound like a man who has had a severe blow in the stomach?

The next day he went to the doctor and what were his complaints? Complaints of stomach pain? No, indeed. The only complaints were neck and shoulder. Of course, that is what he was examined for. That is what he was treated for. The plaintiff would have you believe he had diathermy treatments for hernia. There is no corroboration of that from anybody. There is no medical testimony that that is the sort of treatment that anybody would give for a hernia and I say it is a ridiculous claim that he did have an impact to his stomach and he did not make any complaint of pain, and this picture, taken sometime after this accident, of this hernia, that he obviously now has either a developmental thing that has developed from the old hernia that he has had for

Tr. A-29 years or it is something that has occurred in his work as a carpenter's helper. He hasn't missed a day over there as a carpenter's helper. From the day of the accident in 1952 up to the time that Dr. Wein saw him in July of 1952, a carpenter's helper can receive strains that can cause hernias and even receive it without knowing it.

As a matter of fact, Mr. Thrasher said he didn't know how he got this one, the one that he was operated on for. He didn't know how he got this. Does he know how he got the hernia 5 years before? But he knows how he got the one he is trying to collect for from Giant Food and Mr. Cunningham, because he says this was caused on the day of this accident, and yet he has none of the clinical corroboration of that which you would have expected if he had had any blow to his stomach at the time of the accident.

So I say that this hernia is out of the picture.

Moreover, there is no proof, of course, that any hernias are permanent. There is no proof he has sought any medical attention for hernias. Apparently, the one he had 27 years ago he had operated on successfully and it didn't give him any trouble for years and yet these 9 medical doctors and 1 orthopedic man, has he been to one of

them and asked for any treatment and asked for relief of this hernia? Is it a thing that is not subject to correction? There is not a word of

Tr. A-30 proof and, to the contrary, it is indicated that 27 years ago he got rid of the one that he had and yet here they are talking about permanent injuries by virtue of this hernia, that at least, from Dr. Gallagher who saw him about a year after the accident, was the size of a cantaloupe, he said.

Well, he has let it grow, apparently seeking no relief at all from that date to this. Dr. Gallagher saw him back on March 30, 1953, and here it is more than 4 years later and he still hasn't been to anybody to see if he could have anything done about it.

I submit hernias can be cured. He has got a hernia regardless of what the cause was and if it were giving him any difficulty, he would be going to a doctor to get rid of it and he would get rid of it. There is no proof hernia is a permanent thing, so I say, in this case, there should be no liability, that the damages, such as they are, are minor in nature.

* * * * *

Tr. A-31 Dr. Hudgins' bill was \$206. He is the osteopath. I was referring to the bills for the year of the accident which total \$156. There was talk of X-rays of some \$15; Dr. Wein, \$45, and that is for both of them. There was Dr. O'Doherty, \$15; Dr. Forster, \$25. That is a total of \$256 medical expenses for the year of the accident. If there were any others, of course your recollection would prevail over mine.

According to my recollection, he said he spent \$58 on repair of the jeep. He said they weren't complete repairs but he leaves you completely in the dark as to what complete repairs would have cost, so \$58 is all that is attributable to the property damage.

* * * * *

Tr. A-32 So you have there a total of in the neighborhood of five to six hundred dollars as the out-of-pocket expenses in this case and, as I said in the opening statement, if any liability is here at all, it is a relatively minor matter. Five or six hundred dollars is not to be

sneezed at, but it is certainly not a large out-of-pocket expense and if they should recover anything, it should bear some reasonable relationship to the out-of-pocket in this case, which are a relatively minor sum. You cannot be left to speculate what the other doctors charged, if anything. I don't remember anybody else testifying what his bill was or if he submitted any bill, but you can't speculate about that.

It is the plaintiffs' burden of proof to establish what their medical expenses were and if they don't give you any evidence, His Honor will instruct you you must be controlled by the evidence and you cannot consider medical expenditures already presumably incurred unless they give you some guide in the evidence, because you are not here to guess and speculate. You are here, under your oaths, to decide this case on the evidence that has been produced here on the witness stand. If they do not produce it, the burden is on them to do so and then there can be no recovery for those particular elements, so I think that there is no liability and that if there were any liability, it would be a relatively nominal recovery.

Tr. A-33 The interesting thing to me about this lawsuit, from the standpoint of the trial of it, is whether Mr. Thrasher has really sustained any damage in this action to himself at all, or whether, in other words, you are dealing with a psychiatric proposition, a mental condition, or whether he really has the multiple injuries, the multiple complaints that he says he has. If he has these various pains that he says he has, were they caused by the arthritis which admittedly the defendants in this case, in this action, did not cause. That is a degenerative thing. As we get older, we get stiff in the back, in other joints. Some of us more than others, but it usually comes along about 40 or 50. Mr. Thrasher is in his 50s and it would be odd if he didn't get some symptoms and some pain, so, coupled with that, if he has certain remarkable psychiatric tendencies, perhaps that accounts for the multiple complaints and pains. It isn't every day you see a plaintiff come in with bizarre complaints. I wanted to get you to know him when he testified and I think you did get to know him. You are a new jury but I dare say in your month's service

here you won't see another plaintiff complaining of such symptoms when the doorbell rings that his foot hurts or when he turns on the TV on a certain channel that will cause a pain in his knee.

Those are not physical symptoms and the men who say so, these men, a neurologist and specialists in the study of nerves, know where the nerves go and where the anatomical pattern is for nerves know that

Tr. A-34 there is no physical or organic basis for that. There being no physical or organic basis for it, if he has these symptoms at all, then they originate in the mind. They are psychogenic, as the neurologists say.

To help you, you must reach that decision as to whether you are dealing with a psychiatric condition and these complaints are probably due to that condition largely and the only way to do that is to look at the medical testimony in this case and, as I say, the medical burden of proof is on the plaintiff just as the burden of proof is on him as to the liability aspect of the case. If they fail to satisfy you by a fair preponderance of the evidence, then you must resolve the doubt, if any, in favor of the defendants.

I don't think there is much doubt. I think the fact is these bizarre complaints have their origin in Mr. Thrasher's mind, that he had a personality that long before this accident was subject to self-pity and feeling sorry for himself and had somewhat abnormal reactions to ordinary events.

* * * * *

Tr. A-35 Dates are very significant in this case because for 3-1/2 years Mr. Thrasher, who says he was in daily pain, did not seek any treat-

Tr. A-36 ment at all from July of 1952 when he saw Dr. Wein until he got treatment -- he didn't get any more treatment, he says, until he got to Dr. Hudgins in January of 1956. That is 3-1/2 years.

Mr. Thrasher didn't even go to anybody to be examined or to be diagnosed in between seeing Dr. Terrafranca in March of 1953 and October of 1955. That is 2-1/2 years that he didn't even see anybody.

Here is a man in daily pain, he says. Is that the way people act? You know from your own common sense and experience that if you are in this excruciating agony that the plaintiff is telling you he had every day, you don't go 2-1/2 years without going and having something done about it. That is just not within your common every-day experience and that is a very good test as to the likelihood of this testimony that you have heard.

Of course, in any accident the man best qualified to know what was caused by that accident is the doctor who saw him first, and that is Dr. Hottel. He hasn't got any reason to favor Mr. Cunningham. He doesn't know Mr. Cunningham from Adam and they accuse him of prejudice. Why, I don't know, but he saw Mr. Thrasher on April 15, 1952, and he treated him up until July 28 of 1952. What did he treat him for? Did he treat him for any stomach pains? No, he did not, because the complaints were not stomach pains. He treated him for neck and shoulder

Tr. A-37 pains and he doubted if he needed diathermy treatments. He noted on his records on the 25th of April that this man was trying to build up a claim against some insurance company. That was Dr. Hottel, his own physician, and what he thought. He continued to treat him with these diathermy treatments because Mr. Thrasher came back and wanted diathermy treatments, so he continued until July 28, 1952. Did that additional time change Dr. Hottel's opinion? Did he conclude that there really was an injury or did he think that there was nothing wrong substantially with this man?

Well, when Dr. Hottel wrote the plaintiff's attorney in June of 1953, he reported that he had never been able to determine any real injury to Mr. Thrasher by physical examination or X-ray, so he is prejudiced.

The next man was Dr. Gottlieb, the man who isn't here. His Honor will instruct you that it is the law that if a witness is peculiarly available to one party and they fail without reasonable excuse to call and produce him, then you are at liberty to draw the inference that if he had testified he would have testified contrary to the contentions of

that party, and I say that that is particularly applicable to Dr. Gottlieb. Here is a man who saw him while he was still under Dr. Hottel's care. Mr. Thrasher is contending that this hot foot that he gets is due to this accident. If it is due to this accident, why didn't he bring in this doctor who saw him soon after the accident and ask him if it was due to the accident or not?

I submit the reason is that if he had brought Dr. Gottlieb in his testimony would have been unfavorable and His Honor will instruct you that you can draw that inference from their failure to produce him. Another reason they probably didn't bring him in is, according to the plaintiff himself, Dr. Gottlieb wrote a report that he had dropped some furniture on his feet. The plaintiff denies that. Had he dropped any furniture on his feet or not? I don't know but the inference is if Dr. Gottlieb had been called in he would have said that was what the plaintiff told him, because where would he have gotten the information except from the man himself when he was complaining of foot pain?

* * * * *

Tr. A-41 Dr. Forster made all those tests and he came up with the conclusion that the neurological examination was entirely negative. The reflexes in the lower extremities, the legs were normal, and he could find no wasting away, no atrophy of the muscles, and there was no evidence of nerve root involvements.

Dr. Forster looked at the cervical spine films which were made available to him and he believed these to be normal and except for old arthritis changes, and then he said, "I do not believe this man has an organic neurological illness. He is a very tense, nervous individual."

Tr. A-42 You could see that from the demeanor of Mr. Thrasher on the stand and in the courtroom. That is just the way he is. There is nothing that can be done about that but it is not due to the accident. In recounting his symptoms, the doctor said they were virtually stereotyped answers. A doctor will ask the patient he is examining about a particular complaint and if he gets the same answer back in the same stereotyped fashion, that is significant to a trained and skilled

man as Dr. Forster was. He said he twice mentioned that he was not making these things up, that they were not coming from his mind. Like Shakespeare said, he protests too much.

* * * * *

He said his complaints were on a psychogenic basis, that is, coming from the mind, and that he would suggest that he have psychiatric treatments, and that is what Dr. Forster recommended, that he have psychiatric treatment, that there was no neurological nerve root involvement.

Tr. A-43 The plaintiff says that he wanted something to be done for these complaints. He has been going to the doctors to get help about these complaints. He got a copy of the report of Dr. Forster and he got a copy of the report, no matter how many typographical errors did get in, recommending that he have psychiatric treatment. If you really want to get rid of these complaints, these alleged pains, as distinguished from building up a lawsuit against somebody, then you will follow the doctor's recommendation. You don't just ignore this doctor's recommendation but you go and try to do something about it. You try to get relief from this daily pain that he says he was experiencing, so he has not to this date followed the advice of Dr. Forster and I think it is the most significant thing in this entire lawsuit.

The other doctors didn't see him within reasonable proximity of the accident.

* * * * *

Tr. A-45 So we are through with the medical doctors and you have a period of 3-1/2 years between this last treatment Dr. Wein is supposed to have given him, a couple of prescriptions, 3-1/2 years before, until we find ourselves in the hands of Dr. Hudgins, an osteopath. I haven't any brief against osteopaths. They are probably fine people and they may make some people feel good. So would a Swedish masseur but I don't think that Dr. Hudgins is qualified, when he sees a man in January 1956, a man with his limited qualifications, is qualified to express any opinion

Tr. A-46 about an accident that happened almost 4 years before.

Dr. Hudgins belongs to a class of men that are not allowed to practice medicine in the general hospitals of their own State. He is not even a specialist among osteopaths. He says that they have experts on nerves and they have experts on bones, but he is not an expert of either category and yet he comes in and says he has done \$206 worth of treatments. Whether or not he has been paid for them has not been brought out and he corroborates the plaintiff's claim of a causal connection between these many symptoms as opposed to the opinion of the men with qualifications of Dr. Forster and Dr. O'Doherty and people of that category, people who saw him within a reasonable time after the accident.

I say that that sort of evidence does not sustain the burden of proof that Mr. Thrasher sustained any injury as a result of this accident. Three and one-half years and no treatment, no treatment from the time of Dr. Wein until he gets to Dr. Hudgins who so far has run up a bill of \$206, who tells the man he can never be cured and he will have to keep coming back, presumably, for the rest of the man's life. That is the sort of testimony they are relying on in this case.

* * * * *

Tr. A-47 That is about all there is to the medical testimony. I think, when you take those into consideration and lay them alongside your own observation of the plaintiff on the stand, you will conclude that these bizarre complaints, supposed to give him pain every day, and yet he goes 3-1/2 years without seeking any treatment, 2-1/2 years without even seeking any treatment, you will probably find a large part of them do originate in the mind and it is a matter that Giant Food and Mr. Cunningham are not responsible for.

Tr. A-48 Mr. Thrasher's personality problems, as developed in his testimony, originated long before this accident, back in the early days of the war when he was working with the Government as a photographer. He applies for a raise in pay and somebody gets him out of his position as a result of that or invite him to resign. I don't quite know how he expressed it. He felt some sense of being imposed on. He got a job in

Silver Spring doing this secret work and there again outside influences prevented him from getting the treatment he thinks he is entitled to. The GIs step in and get his job. All of this happened long before this accident and Giant Food and Mr. Cunningham are not responsible for it.

I think a large part of his complaints are of psychogenic origin. The best qualified man says that they are.

The burden of proof, I submit, is on the plaintiff. In reaching your conclusion, if you find he does have these complaints and if they are not in his mind, then it is equally possible that they are due to arthritis which he does have, a degenerative thing, and which is going to get everybody complaints in their backs.

* * * * *

Tr. A-49 His genuine out-of-pocket, as a result of this accident, amounts to a relatively few hundred dollars and although it may be a small sum of money, if you believe that we were liable that is the basis upon which you should fix the amount.

* * * * *